THE INDIAN LAW REPORTS,

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council ... ... J. V. WOODMAN, *Middle Temple.*
High Court, Allahabad ... ... W. K. PORTER, *Gray's Inn.*

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JUDGES OF THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES.

1907.

CHIEF JUSTICE

THE HON'BLE SIR JOHN STANLEY, KT., K.C. ... [*On leave from 27th April to 15th August.*]

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THE HON'BLE SIR GEORGE EDWARD KNOX, KT. ... [*Acted as Chief Justice from 27th April to 15th August.*]

" P. C. BANERJI ...

" SIR WILLIAM BURKITT, KT. ... [*On leave from 1st May to 31st July.*

" R. S. AIKMAN. ...

" H. G. RICHARDS, K.C.

" C. C. DILLON ... [*Officiating from 27th April to 15th August.*]

" H. D. GRIFFIN. ... [*Officiating from 1st May to 31st July.*]

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———1856—XV (HINDU WIDOWS' REMARRIAGE ACT), SECTION 2—*Hindu widow—Remarriage permitted by rules of caste—Widow not deprived of property of her first husband.*] Where the rules of her caste recognise the right of a Hindu widow to remarry, a remarriage has not the result of divesting her of the property of her first husband.

Hur Saran Das v. *Nandi*, I. L. R., 11 All., 330, *Dharam Das* v. *Naud Lal*, Weekly Notes, 1886, p. 78, and *Ranjit* v. *Radha Ram*, I. L. R., 20 All., 476, referred to

G died, leaving a widow *T* and a mother *K*. *T*, being permitted to do so by the custom of the caste, married again. *T* transferred her interest in her first husband's property to *D* and *S*. *K* purported to sell the same property to *L*, who mortgaged it to *K T* and *N R*. *Held*, on suit by *D* and *S* for recovery of the property transferred, that the plaintiffs were not bound to reimburse the defendants (*K*, *L* and *L*'s mortgagees) in respect of any debts of *G* which they might have paid.

Khuddo v. Durga Prasad, I. L. R., 29 All. 122

———1860—XLV (INDIAN PENAL CODE), SECTIONS 62 AND 406—*Criminal breach of trust—Sentence.*] *Held* that the special sentence provided for by section 62 of the Indian Penal Code is a sentence which should only be inflicted in rare cases—those in which crimes of an anonymous nature are exposed or in which offences have been committed under aggravated circumstances. *Queen* v. *Mahomed Akbar*, 12 W. R., Cr. R., 17, followed.

Emperor v. Amrit Lal, I. L. R., 29 All. 25

SECTION 153—*Definition—"Wantonly"—Act No. V of* 1861 *(Police Act), section* 30—*Disobedience to orders of Police as to conduct of a procession.*] Where certain persons taking part in a religious procession gratuitously disobeyed the orders of the police concerning the manner in which such procession was to be conducted, with the result that a riot was only averted by bringing armed police upon the scene, it *was held* that the persons concerned acted—though not "maliguantly"—yet "wantonly" within the meaning of section 153 of the Indian Penal Code, and were properly convicted under that section.

Held also that a conviction under section 153 of the Indian Penal Code does not warrant the taking of action under section 106 of the Code of Criminal Procedure.

Empress v. Husain Bakhsh, I. L. R., 29 All. ... 669

SECTION 193—*Fabricating false evidence—Definition.*] One Chedi Lal, whose brother Debi was an accused person, applied to the Court on behalf of the accused asking that the witnesses for the prosecution might first

of all be made to identify Debi. The Court assenting to this request, Cheda Lal produced before the Court ten or twelve men, none of whom could be identified as Debi by any of the prosecution witnesses. Upon being asked by the Court where Debi was, Cheda Lal pointed out a man who, upon further investigation, was discovered to be wearing a false moustache and to be not Debi at all, but one Chimman. *Held* upon these facts that Cheda was rightly convicted of fabricating false evidence having regard to the definition contained in section 192 of the Indian Penal Code.

Emperor v. Cheda Lal, I. L. R., 29 All. 354

ACTS — 1860 — XLV (INDIAN PENAL CODE), SECTION 211 — *False charge — Practice — Opportunity to be given to prove charge before prosecuting.*] Where it is intended to prosecute any person under section 211 of the Indian Penal Code such person ought to be given an opportunity of substantiating, if he can, the charge which he has brought before he is prosecuted. *Queen Empress* v. *Ganga Ram*, I. L. R., 8 All., 38, and *Queen-Empress* v. *Raghu Tiwari*, I. L. R., 15 All., 336, followed.

Emperor v. Tula, I. L. R., 29 All. 587

SECTION 223—*Criminal Procedure Code, section 54—Escape from lawful custody—Chaukidar.*] The police of an adjoining Native State arrested in British territory one Paran Singh suspected of having committed an offence in the Native State, and made him over to one Debi, a chaukidar, from whose custody he escaped. *Held* that neither the original arrest nor the subsequent custody by the chaukidar were lawful, and therefore that the chaukidar could not properly be convicted under section 223 of the Indian Penal Code. *Empress of India* v. *Kallu*, I. L. R., 3 All., 60, *Kalus* v. *Kalu Chaudhri*, I. L. R., 27 Calc., 866, and *King-Emperor* v. *Jokhi*, I. L. R., 23 All., 236, referred to.

Emperor v. Debi, I. L. R., 29 All. 377

SECTION 225—*Criminal Procedure Code, sections 59 and 60—Rescue from ... Lawful ... Definition.*] A private person lawfully arrested a thief on a charge of committing theft and made him over to a village chaukidar to be taken to the nearest police station. On the way to the police station three persons seized the chaukidar, and the thief made his escape. *Held* that the rescuers were rightly convicted under section 225 of the Indian Penal Code. The arrest of the thief having been in the first instance lawful, the requirements of section 59 of the Code of Criminal Procedure were sufficiently complied with by the person arresting sending him to the police station in the custody of the chaukidar. *Queen Empress* v. *Petambi*, I. L. R., 11 Mad., 490, followed. *King-Emperor* v. *Jokhi*, I. L. R., 23 All., 236, referred to.

Emperor v. Parsiddhan Singh, I. L. R., 29 All 470

SECTIONS 230 AND 420—*Definition—"Coin"—Uttering false coin—Cheating.*] Where the offence charged consisted of selling or pawning as genuine gold mohurs of the reign of Shahjahan silver rupees of that reign which had been gilt or in some way covered over with gold, it was *held* that the offence would be that of cheating and not that of uttering false coin. A gold mohur of the reign of Shahjahan cannot be deemed to be "coin" within the meaning of section 230 of the Indian Penal Code, as it is not used for the time being as money. *Regina* v. *Bapu Yadav*, 14 Bom. H. C. Rep., 172, followed. *Queen* v. *Kuay Beharee*, 5 N.-W. P., H. C. Rep., 187, distinguished.

Emperor v. Khushali, I. L. R., 29 All. 151

ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 304 AND 325—*Assault by three persons armed with lathis—Intention—Culpable homicide—Grievous hurt*] Three persons attacked a fourth with lathis, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt as to which of the three assailants struck that blow.

Held that the offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder. *Queen-Empress* v. *Duma Baidya*, I. L. R., 19 Mad., 483, followed.

Emperor v. Bhola Singh, I. L. R., 29 All. 262

SECTION 363, *See* Act (Local) No III of 1901, sections 147, 227 and 228 372

SECTION 411—*Possession of stolen property—Joint Hindu family—Liability of head of the family or managing member*] Stolen property consisting of a considerable quantity of cloth weighing about five maunds was discovered on search by the police in a locked room in a house belonging to and inhabited by a joint Hindu family composed of a father, son and grandson. The son was found to be the managing member of the family, and the key of the room in which the stolen property was found was produced by him. The circumstances were such that it was very improbable that the cloth could possibly have been placed where it was found without the connivance of some or all of the members of the family. *Held* that under the above circumstances the conviction of the managing member of the family under section 411 of the Indian Penal Code was a proper conviction. *Queen-Empress* v. *Sangam Lal*, I. L. R., 16 All., 129, referred to.

Emperor v. Budh Lal, I. L. R., 29 All. 598

SECTIONS 426, 426—*Defamation—Mischief—Act (Local) No. I of* 1900 *(N.-W. P. and Oudh Municipalities Act), section* 167] Certain cattle belonging to one M. H. upon various occasions when in charge of a servant of M. H. strayed, or were driven, into the Government Gardens at Saharanpur and there caused damage *Held* that M. H. could not on these facts be convicted of the offence of mischief. *Forbes* v. *Girish Chander Bhattacharjee*, 14 W. R., 31, and *Empress* v. *Bai Baya*, I. L. R., 7 Bom., 126, followed *Held* also that section 167 of the Municipalities Act, 1900, did not apply, that section being one dealing with offences against the person *King-Emperor* v. *Patan Din*, Weekly Notes, 1905, p 19, followed.

Emperor v. Mehdi Hasan, I. L. R., 29 All. ... 566

SECTION 456—*Lurking house-trespass in night—Intention—Burden of proof*] The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her bundle. The evidence of the complainant clearly showed that the accused was not there with the consent, or at the invitation or for the pleasure of the complainant. *Held* that the accused was properly convicted under section 456 of the Indian Penal Code, it being for him to show that his intention was under the circumstances innocent. *Brij Basi* v. *The Queen-Empress*, I. L. R., 19 All., 74, distinguished. *Balmakund Ram* v. *Ghansamram*, I. L. R., 32 Calc., 391, followed.

Emperor v. Ishri, I. L. R., 29 All, ... 46

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 499—ACT No. I OF 1872 *(Indian Evidence Act), sections 105 and 132—Defamation—Witness—How far witness protected when giving evidence.*] If a witness whilst giving evidence makes a statement concerning any person which amounts to defamation, he may be prosecuted under section 499 of the Indian Penal Code in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the exceptions to section 499 of the Code, or that he is protected from prosecution by the proviso to section 132 of the Indian Evidence Act, 1872.

So *held* by KNOX, Acting C J., and AIKMAN, J., RICHARDS, J., *dissentients.*

Baboo Gunnesh Dutt Singh v *Mugneeram Chowdhry*, 11 B. L. R., 321, distinguished. *Bank of England* v *Vagliano Brothers*, [1891] A C., 107, *Narendra Nath Sircar* v. *Kamalbasini Dasi*, I. L. R., 23 I. A., 18, *Robinson* v *Canadian Pacific Railway Company*, [1892] A. C., 481, *Queen* v. *Pars ram Doss* 3 W. R., Cr. R. 45, *Scale* v. *Ram Narain Bose*, 4 W. R., Cr. R., 22, *Manjaya* v. *Neelu Shetti*, I. L. R., 11 Mad., 477, *Queen Empress* v. *Bithapi*, I. L. R., 17 Bom., 127, *Queen-Empress* v. *Bala Ghose Vithal*, I. L. R., 17 Bom., 573, *Bhikumber Singh* v. *Beeharam Sircar*, I. L. R., 15 Calc., 264, *Woolfun Bibi* v *Jemaruth Sheikh*, I. L. R., 27 Calc., 292, *Dasoon Singh* v. *Mahip Singh*, I. L. R., 10 All., 425, and *Queen-Empress* v. *Gajadhar*, Weekly Notes, 1890, p 170, referred to by KNOX Acting C J

Gunnesh Dutt Singh v *Mugneeram Chowdhry*, 11 B. L. R., 321, distinguished. *Green* v *Delauney*, 14 W. R., Cr. R., 27, *Queen-Empress* v. *Balkrishna Vithal*, I. L. R., 17 Bom., 573, *In re Narayan Tevkamji*, I. L. R., 19 Bom., 340, *Amada Ram Shaha* v. *Nemai Chand Shaha*, I. L. R., 23 Calc., 867, *Abdul Hakim* v. *Taj Chandar Mukerji*, I. L. R., 3 All., 815, *Bank of England* v. *Vagliano Brothers*, [1891] A C., 107, and *Narendra Nath Sircar* v. *Kamalbasini Dasi*, I. L. R., 23 I. A., 18, referred to by AIKMAN, J.

Per RICHARDS, J.—A prosecution for defamation under section 499 of the Indian Penal Code will not lie against a witness in respect of any statement made by him in the course of giving evidence, even if such statement may be not relevant to the matter under inquiry *Baboo Gunnesh Dutt Singh* v. ... ... 11 B. L. R., 321 followed. *Dawkins* v. *Lord Rokeby*, L. R., 7 H. L., 744, *Abdul Hakim* v *Taj Chandar Mukerji*, I. L. R., 3 All., 815, and *Dun's Peasad Singh* v. *Charan Singh*, I. L. R., 22 I. A., 205, referred to

Empress v. Ginga Prasad, I. L. R., 20 All. 685

——1861—V (POLICE ACT, SECTION 153, *See* Act No. XLV of 1860, section 153 389

——1869 (OUDH ESTATES ACT)—*Rights assumed to rights—Position of persons holding under proprietary rights conferred on them by Sanads before annexation of Oudh—Policy of Government under Land of Rights Circular No. 2 of 1861—Possession and transfer of such rights.*] The defendants either by themselves or their predecessors in title, had from before the annexation of Oudh held under proprietary rights (known as taluk or the zamindari right) in villages in the talukas of which the plaintiff was the talukdar. In the Record of Rights Circular, No. 2 of 1861, the policy of the Government was declared "that the holders who were found in direct engagements with the State at annexation, or who have uninterruptedly held whole villages on the terms of those patents under the talukdars must be maintained in the full enjoyment of those rights in subordination to the talukdar." Held by the talukdar to recover the villages.

Held, on the evidence and under the circumstances of the case, that the defendants had shown themselves to come within the benefit of the policy declared in the above enactment, and had therefore acquired, upon the annexation of Oudh by the British Government, heritable and transferable rights as against the plaintiff in the villages in suit

Muhammad Mumtaz Ali Khan v. Murad Bakhsh, I. L. R., 29 All 708

ACTS 1870—VII (COURT FEES ACT), SECTION 7, *cl. (b) and (d) section 28—Court fee—Document received through mistake or inadvertence.*] The plaintiff in a suit for pre-emption stated in his plaint —"The suit is valued at Rs 197-8-0, five times of Rs 39-8-0, the amount of revenue of the property." The property claimed was described as "41 bighas 10 biswas 5 biswansis paying a revenue of Rs 39-8-0, entered as holding No. 9 in the khewat, out of 3 biswa 10 biswansi 18 kachwansi 9 nanwansi 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs 95, situate in thok Deputy Ali Raza Khan, in village Ukarna." The Munsarim of the Court in which the plaint was presented on the last day of limitation accepted this valuation and reported that the plaint was properly stamped

Held that inasmuch as the plaintiff had not stated whether the revenue payable in respect of the share claimed had been separately assessed and recorded in the Collector's register as such, it became the duty of the Munsarim to inquire whether it was separately assessed. The plaint had been admitted through the mistake or inadvertence of the officer of the Court and the plaintiff was entitled to the benefit of section 28 of the Court Fees Act, 1870

Hasib-ul-nisa v. Ghafur-ullah Khan, I. L. R., 29 All ... 382

—— .. .. SECTIONS 9, 10, 11 AND 28—*Court fee—Plaint—Court fee on plaint discovered during progress of suit to be insufficient—Limitation—Act No XV of 1877 (Indian Limitation Act), section 4.*] *Held* that when it has been discovered that through mistake or inadvertence a plaint has been filed on an insufficient court fee stamp, the Court upon discovering the mistake can at any time and without any regard to limitation have the proper court fee made up, and when it is so made up, the plaint is as valid as if it had been originally stamped when presented. The principle of the decision in *Balkaran Rai* v. *Gobind Nath Tewari*, I. L. R., 12 All., 123, so far as applicable to plaints, rejected

Hari Ram v. Akbar Husain, I. L. R., 29 All 749

—— .. .. SECTION 17 — *Court fee — Suit embracing two or more distinct subjects — Suit based primarily on an agreement to sell with an alternative claim for pre-emption.*] The plaintiff came into Court claiming in the first place specific performance of an alleged agreement to sell to him certain immovable property; and secondly, in the alternative, the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other.

Held that the suit was within the meaning of section 17 of the Court Fees Act, 1870, a suit embracing two distinct subject-matters, and therefore chargeable with the court fee assessable upon each alternative relief separately.

Hashmat-un nissa v. Muhammad Abdul Karim, I. L. R., 29 All. 155

ACTS 1872—I (INDIAN EVIDENCE ACT), SECTION 4, *See* Act (Local) No. II of 1901, section 201 148

SECTION 30—*Evidence*—*Confession—Retracted confession—Use of retracted confession as against person making it and as against co-accused.*] A retracted confession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons tried jointly with the confessing accused for the same offence.

As regards the person making it a retracted confession may, even without any corroborative evidence, form the basis of a conviction.

As regards other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction, and *semble* that a conviction based on the uncorroborated evidence afforded by the confession of a co-accused would not be unlawful.

Queen-Empress v. *Maiku Lal*, I. L. R., 20 All., 483, followed. *Empress* v. *Ashootosh Chuckerbutty*, I. L. R., Calc., 283, discussed. *Queen* v. *Mohesh Biswas*, 19 W. R., Cr. R., 10, referred to.

Emperor v. Kehri, I. L. R., 29 All. 434

... SECTIONS 105 AND 137, *See* Act No. XLV of 1860, section 409 685

SECTION 114—*Presumption as to possession of stolen property.*] *Held* that the finding in the possession of a person six months after the commission of a dacoity of articles stolen in that dacoity, such articles consisting of jewellery of a very ordinary type and by no means distinctive appearance, is not sufficient to form the basis of a conviction for participation in the dacoity. *Queen-Empress* v. *Burke*, I. L. R., 6 All., 224, and *Ina Sheikh* v. *Queen-Empress* I. L. R., 11 Calc., 190, referred to.

Emperor v. Sughar Singh, I. L. R., 29 All. 138

IX (INDIAN CONTRACT ACT), SECTION 23, *See* Act (Local) No. II of 1901, sections 20, 21 and 31 327

SECTIONS 188, 211 AND 216—*Principal and agent—Ratification—Suit for adjustment of accounts—Two appellate decrees in similar terms—Appeal from one of such decrees only—*Res judicata.] From the decree in a suit for adjustment of accounts both parties appealed. Both appeals were decided by one and the same judgment. Two decrees were framed; but these were in substance identical. The plaintiff appealed from the decree in one appeal only. *Held* that his appeal was not barred by reason of his not having appealed also from the decree in the other appeal. *Mohammasso Bibi* v. *Joynab Bibi*, I. L. R., 33 Calc., 1101, and *Ramalinga Pillai* v. *Vythinatha Sastrial*, I. L. R., 29 Mad., 393, referred to.

The defendants as agents for the plaintiff from time to time entered into certain contracts for the sale of grain for the plaintiff. The defendants discharged these contracts by means of grain of their own and when subsequently the plaintiff sent on grain to the defendants to meet these contracts the defendants sold the plaintiff's grain at a profit. The defendants did not inform the plaintiff either that they had fulfilled the contracts with their own grain or that they had resold the plaintiff's grain at a profit.

Held that the plaintiff was entitled to whatever profit was realized by the defendants on this latter transaction.

Held also that where on a direction by the principal to his agents to purchase grain for him, the agent sold to him their own grain at a price higher than the prevailing market rate, the principal was entitled to repudiate the transaction and could not be alleged to have ratified it in the absence of knowledge that the agents were selling their own property and were charging him in excess of the market rate

Damodar Das v. Sheoram Das, I. L. R., 29 All. ... 730

ACTS—1873—XIX (N.-W. P. LAND REVENUE ACT), SECTIONS 154 AND 190—*Mahal taken under direct management—Rent of sir land fixed by Collector—Sale of mahal before release from direct management.*] A mahal was taken by the Collector under direct management and the late proprietor was recorded as ex-proprietary tenant of the *sir* land and his rent was fixed by the Collector under the provisions of section 190 of Act No. XIX of 1873. While still under direct management the mahal was sold. The purchaser paid up the arrears of land revenue due thereon and possession was given to him. *Held* that the purchaser was entitled to claim from the ex-proprietary tenant the rent fixed by the Collector: it was not incumbent upon him to get the rent fixed again.

Hasan Ali Khan v. Mazhar-ul-Hasan, I. L. R., 29 All. ... 318

——— X (INDIAN OATHS ACT), SECTION 9—*Agreement to be bound by statement on oath of specified person—Such agreement not revocable except for special cause.*] Where a party to a suit has made either a reference to arbitration or a reference to the oath of a witness such as is provided for by section 9 of the Indian Oaths Act, 1873, he should not be allowed arbitrarily to withdraw from the reference. *Lekhraj Singh* v. *Dulhma Kuar*, I. L. R., 4 All., 302, and *Ram Narain Singh* v. *Babu Singh*, I. L. R., 18 All., 46, at p. 49, referred to.

Chiddu v. Kunwar Son, I. L. R., 29 All. 49

——— XIX (N.-W. P. LAND REVENUE ACT), SECTIONS 194*(g)* *and* 203—*Act (Local) No. III of* 1899 *(Court of Wards Act), sections* 9, 35 *and* 47 *—Power of Court of Wards to sell property under its superintendence.*] The estate of a Muhammadan lady, named Hawa Begam, was at her own request taken under the superintendence of the Court of Wards under section 194, clause *(g)*, of Act No. XIX of 1873. This was in 1896. In 1902 the Court of Wards sold a portion of Hawa Begum's property, as was alleged, without her consent. *Held* on suit by persons claiming title through Hawa Begum to recover the property so sold, that the Court of Wards was under the circumstances entitled to sell, even without the owner's consent, and that its discretion could not be questioned in any Civil Court.

Semble that if the property had been placed under the superintendence of the Court of Wards, under section 9 of Local Act No. III of 1899, and if the sale had been made without the consent of the proprietor, otherwise than on the ground set out in the concluding paragraph of section 35, the sale would have been a bad sale and the Civil Court could have entertained a suit to question the power of the Court of Wards to sell.

Mohsin Shah v. Mahbub Ilahi, I. L. R., 29 All. ... 589

———1877—IX (INDIAN MAJORITY ACT), SECTION 3, *See* Act No. VIII of 1890, section 52 672

———1877—I (SPECIFIC RELIEF ACT), SECTION 21—*Arbitration—Alleged revocation of submission—For what cause submission may be revoked.*] Although no party to an agreement of reference can

revoke the submission to arbitration, unless for good cause, and a mere arbitrary revocation of the authority is not permitted. the fact, if proved, that the arbitrator was on friendly terms with one of the opposite side might be a good ground for revocation of the submission. *Padmanjee Nursingh Doss* v. *Mussamut Kishen & Co.*, 12 Moo. I. A., 112, and *Pahal* v. *Bansidhar*, I. L. R., 8 All., 67, referred to.

Bansidhar v. Sital Prasad, I. L. R., 29 All. 13

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 23(c), See Hindu law 37

——— III (INDIAN REGISTRATION ACT), SECTION 17—*Registration—Division of a mortgage into two in order to escape registration.*] *Held* that there is nothing in the Registration Act to render illegal the division of what was apparently one mortgage transaction relative to a loan of Rs. 180 into two mortgage deeds of even date each for Rs. 90.

Ramji Mal v. Chhote Lal, I. L. R., 29 All. ... 50

SECTIONS 76 AND 77 —*Registration—Suit to compel registration—Six weeks of such suit.*] Where a Registrar refused to register a document presented to him upon the grounds that there was not sufficient proof that the document was executed by the authority of the alleged executants and that there was undue and unexplained delay in presenting the document for registration, it was *held* that a suit would lie under section 77 of the Indian Registration Act, 1877, to compel registration.

Held also that in a suit under section 77 of the Registration Act the Court is only concerned with the genuineness of the document sought to be registered and not with its validity.

Kudratia Begum v. *Najib-un-nisa*, I. L. R., 2 Calc., 161, and *Raj Lukhi Ghose* v. *Behendra Chundra Mookerji*, I. L. R., 24 Calc., 669, referred to.

Kanhaya Lal v. Sardar Singh, I. L. R., 29 All. ... 184

———XV (INDIAN LIMITATION ACT), SECTION 4, See Act No. VII of 1870, sections 9, 10, 11 and 28 740

SECTIONS 5 AND 14 —*Limitation—Appeal — Delay in filing Appeal due to appellant's bona fide accepting erroneous legal advice.*] Where a client bona fide accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and misled by that advice fails to file an appeal within time, he is entitled to the benefit of section 5 of the Indian Limitation Act, 1877. *Balwant Singh* v. *Thomas Rose*, I. L. R., 5 All., 691, *Brij Mohan Das* v. *Manna Mal*, I. L. R., 19 All., 348, and *Kura Mal* v. *Ram Nath*, I. L. R., 28 All., 413, followed. *In re Coles and Ravenshaw*, 1 K. B., 1, referred to.

Anjora Kunwar v. Babu, I. L. R., 29 All. 338

SECTION 7 — *Evidence —Proof of date of birth—Minority—Plaintiff having three years to sue after attaining majority—Act No. XV of 1877 (Indian Limitation Act), section 7—Nature of evidence required to prove date of birth.*] Although in India it is difficult to prove such a fact as the date of birth after a lapse of many years, and it would be unreasonable to require such a class of evidence as would be justly demanded in a similar case in England, the evidence must yet be such as to carry reasonable conviction to the mind.

In this case on the proof of the date of the plaintiff's birth depended the question of whether or not the suit was brought within three years of her attaining majority, and it was held that the evidence was insufficient to prove the true date of her birth, and that therefore the suit was barred by limitation

Shah Ara Begam v. Nanhi Begam, I. L. R., 29 All. ... 29

ACTS—1877—XV (INDIAN LIMITATION ACT), SECTION 7; SCHEDULE II, ARTICLES 178 AND 179—*Execution of decree—Limitation—Minority.*] On the 11th of May 1886 a decree under section 88 of the Transfer of Property Act, 1882, was passed in favour of one *S L*. In June 1888 *S L* died leaving him surviving three sons, all minors. On the 30th of April 1889 these three sons, still minors, made an application for an order absolute under section 89 of the Act. Nothing further was done towards execution of the decree until the 1st of October 1904 when the three sons, one being still a minor, again applied for an order absolute for the sale of the mortgaged property. *Held* that the application of the 1st October 1904 was not barred by limitation *Zamir Hasan* v. *Sundar*, I. L. R., 22 All., 198, followed. *Bhagat Bihari Lal* v *Ram Nath*, I. L R., 27 All., 704, and *Baldeo* v. *Ibn Haidar*, I L. R., 27 All, 625, referred to by Richards, J.

Sri Ram v. Het Ram, I. L. R, 29 All. 279

SECTION 12—*Limitation—"Time requisite for obtaining a copy."*] The words 'the time requisite for obtaining a copy' in the second and third paragraphs of section 12 of the Indian Limitation Act, 1877, are not confined to cases where the person appealing has in person or by a properly authorized agent applied for a copy of a judgment or decree *Ramamurthi Aiyar* v. *Subramania Aiyar*, 12 Mad., L J, 385, dissented from.

Ram Kishan Shastari v. Kashi Bai, I. L. R., 29 All. ... 264

SECTION 19—*Limitation—Acknowledgment of title—By whom such acknowledgment may be made.*] Section 19 of the Indian Limitation Act, 1877, does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made at the time when the acknowledgment was given: it prescribes that, if, before the period of limitation expires, an acknowledgment of liability or right has been made in writing signed by the parties against whom the property or right is claimed, a new period of limitation will be computed from the time of the acknowledgment. *Jagabandhu Bhattacharjee* v *Harimohan Ray*, I. C W. N., 569, referred to

Jugal Kishore v Fakhr-ud-din, I L. R., 29 All. ... 90

SECTIONS 19 AND 20, SCHEDULE II, ARTICLES 59 AND 60—*Limitation—Suit to recover money deposited on current account—Loan—Deposit—Acknowledgment.*] *Held* that a suit to recover money deposited with a banker on a current account is governed as to limitation by article 59, and not by article 60, of the second schedule to the Indian Limitation Act, 1877. *Pitney Lal* v. *Elizabeth Berkeley*, F. A. No. 96 of 1882, decided on the 4th April 1885, followed.

In order that an acknowledgment of a debt should be effectual to save limitation under section 19 of the Indian Limitation Act it must be signed by the person to be bound thereby.

Similarly a part payment of the principal of a debt must appear in the hand-writing of the person making the part payment and not in that of any other person, however authorized.

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Held also that the mere crediting of interest in a banker's books cannot be [illegible] for the purpose of saving limitation, as equivalent to a payment of interest.

Dharam Das v. Ganga Devi, I. L. R., 29 All. 773

ACTS 1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLES 29—*Attachment before judgment—Suit for compensation—Limitation—Tortious act.*] *Held* that the limitation applicable to a suit for damages on account of the alleged unlawful attachment before judgment of a sloop belonging to the plaintiff was that prescribed by article 29 of the Indian Limitation Act, 1877, and that limitation began to run from the date of the attachment. *Muruguesa Mudaliar* v. *Sittarum Ibang*, I. L. R., 23 Mad., 621, *Multan Chand Kundalal* v. *Bank of Madras*, I. L. R., 27 Mad., 346, and *Ram Singh, Mohapattar* v. *Bhattar Manjee Santhal*, 24 W. R., 208, followed. *Surmad* v. *Manekmad*, 6 Bom., Law Rep., 704, distinguished.

Semble that such an attachment, if wrongful, is not a continuing wrong within the meaning of section 23 of the Indian Limitation Act, 1877.

Ram Narain v. Umrao Singh, I. L. R., 29 All. ... 615

SCHEDULE II, [illegible] 18

90, 115, 120—*Limitation—Suit to recover money given to the defendant to be delivered to a third person.*] A gave Rs. 300 to B in order that it might be delivered to C, who had, a few days previously, executed a mortgage in favour of A. B also executed a bond guaranteeing the repayment of the loan by C. On suit by A against B and C, which was decided on the 15th of [illegible] 1902 it was discovered that B had never paid the money to C. On the 1st of December 1904, A sued B to recover the Rs. 300 paid to him as above described. *Held* that the rule of limitation applicable was that provided for by article 48, if not by article 90 or 115 of the Indian Limitation Act, 1877, and the suit was time-barred. *Ramchhar Chaubey* v. *Mata Bhikh*, I. L. R., 5 All., 341, referred to.

Ram Lal v. Ghulam Husain, I. L. R., 29 All. ... 579

——— XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLES 61 AND 83—*Limitation—Suit on bond to recover money of which a third party has in fact had the benefit—Compromise of suit by heirs of obligor—Suit to recover money paid under compromise.*] U. S borrowed money on a bond from U. R. The sole obligor of the bond was U. S, but the money was in fact borrowed for the use of, and was paid to, one M. From time to time the original bond was renewed, and ultimately U. R. sued upon the last bond and obtained a decree for a large sum of money against the heirs of U. S. The defendants appealed to the High Court, but pending the appeal entered into a compromise with the plaintiff on the 2nd of January 1900, whereby they agreed to pay to the plaintiff the sum of Rs. 51,000 and costs of the High Court. Upon the 5th of November 1902 the heirs of U. S. paid to the plaintiff [illegible] balance of this compromise Rs. 40,000 and on the 17th [illegible] they instituted a suit against M to recover the amount so paid and their costs. *Held* that [illegible] U. S was [illegible] but the principal debtor although the money was borrowed for M's benefit; that the payment made on the 5th of November 1902 in pursuance of the compromise referred to above [illegible] and that the heirs of U. S. were entitled to recover from M the sum of Rs. 40,000 so paid with interest, but not the costs of the High Court, in respect of which the suit was barred.

Lewis v. *Campbell*, 8 C. B., 546, and *Ram Tahal Singh* v. *Bisesar Lall Sahoo*, L. R., 2 I. A., 131, referred to by Knox, A.C.J.

Giraj Singh v. Mul Chand, I. L. R., 29 All. 627

ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 75—*Bond—Instalments—Waiver of right to recover whole amount on non-payment of instalment—Limitation.*] Where money secured by a bond is payable by instalments, with a condition that the whole amount secured will become due upon non-payment of any instalment, the creditor is not bound to enforce this condition, but he may accept payment of instalments after due date—thereby impliedly waiving his right to sue for the whole amount due—and may sue upon a subsequent default in payment of any future instalment. *Basant Lal* v *Gopal Prasad*, Weekly Notes, 1906, p 193, distinguished.

Maharaja of Benares v. Nand Ram, I. L. R., 29 All. ... 431

SCHEDULE II, ARTICLE 125 —*Limitation—Alienation—Fictitious award —Hindu widow.*] A Hindu widow, plaintiff in a suit to recover property, in respect of which she was entitled to a Hindu widow's estate, from the possession of the widows of other members of her husband's family, entered upon a collusive arbitration by which the whole of the property of the plaintiff's husband was divided amongst certain female members of the family, it being declared that each of the parties to the arbitration proceedings took an absolute estate in the share allotted to her. *Held* that this proceeding amounted to an "alienation" of the property so dealt with within the meaning of article 125 of the second schedule to the Indian Limitation Act. *Sheo Singh* v. *Jooni*, I. L. R., 19 All., 524, referred to.

Ram Sarup v Ram Dei, I. L. R., 29 All. 239

SCHEDULE II, ARTICLE 184, *See* Act No. IV of 1882, sections 62 and 63 471

SCHEDULE II, ARTICLE 138, *See* Execution of decree 468

SCHEDULE II, ARTICLE 144—*Limitation— Adverse possession — Lease—Possession derived from a lessee not necessarily adverse as against the lessor.*] *Held* that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. The principle of *Muhammad Hasan* v. *Mul Chand*, I. L. R., 27 All., 395, *Sharat Sundari Dabia* v. *Bhobo Pershad Khan Chowdhuri*, I. L. R., 13 Calc., 101, *Womesh Chunder Gangto* v. *Kaj Narain Roy*, 10 W. R., 15, *Krishna Gobind Dhur* v. *Hari Churn Dhur*, I. L. R., 9 Calc., 367, *Sheo Sahye Roy* v. *Luchmeshur Singh*, I. L. R., 10 Calc., 577, and *Ganga Kumar Mutter* v. *Asutosh Gossami*, I. L. R., 23 Calc., 863, followed. *Rejoy Chunder Banerjee* v *Kully Prosunno Mookerjee*, I. L. R., 4 Calc., 327, referred to. *Lekhraj Roy* v. *The Court of Wards on behalf of the Rajah of Durbhangah*, 14 W. R., 395. *Brindabun Chunder Sircar Chowdhry* v. *Bhoopal Chunder Bowas*, 17 W. R., 877, *Prosunnomoyi Dasi* v. *Kali Das Roy*, 9 C. L. R., 377, and *Gobinda Nath Shaha Chowdhry* v. *Surja Kantha Lahiri*, I. L. R., 26 Calc., 460, not followed

Thamman Pande v. The Maharajah of Vizianagram, I. L. R., 29 All. 593

SCHEDULE II, ARTICLES 147, 132 AND 120, *See* Hindu law 544

SCHEDULE II, ARTICLE 175C, *See* Civil Procedure Code, sections 368, 582 and 587 535

SCHEDULE II, ARTICLE 179 — *Execution of decree—Limitation—"Step in aid of execution."*] *Held* that an application made by the transferee of a

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decree asking that his name might be substituted on the record for that of the original decree-holder, and a further application asking for time to serve one of the judgment-debtors, whose address was not then known, with notice of the application for substitution were both applications made to the proper Court to take some step in aid of execution within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877.

Pitam Singh *v.* Tota Singh, I. L. R., 29 All. 801

ACTS—1879—XVIII (LEGAL PRACTITIONERS ACT), SECTIONS 13 AND 14—*Jurisdiction—Inquiry by Court subordinate to the High Court into conduct of pleader practising before it.*] *Held* that the words "any such misconduct as aforesaid" as used in section 14 of the Legal Practitioners Act, 1879, relate to all the cases set out in section 13 of the Act. The authority therefore to enquire into a matter falling within the purview of section 13, clause *(f)* of the Act is not confined to the High Court, but may be exercised by a subordinate Court before which the pleader or mukhtar whose conduct is called in question may be practising. *In the matter of Purna Chunder Pal, Mukhtar*, I. L. R., 27 Calc., 1023, *In the matter of Southekai Krishna Rao*, I. L. R., 15 Calc., 152, and *In the matter of a Pleader*, I. L. R., 26 Mad., 448, referred to.

Muhammad Abdul Hai. In the matter of the petition of —, I. L. R., 29 All. 61

——— SECTION 28—*Pleader—Agreement to allow legal fees to be set off against money advanced to a pleader by a client.*] A client advanced certain money to a pleader who subsequently appeared for the lender in various cases. On suit by the lender to recover his loan the pleader set up an agreement entitling him to set off against the money borrowed his fees for professional services. *Held* that the pleader was entitled to set-off in the shape of reasonable remuneration for services actually rendered, although there was no such agreement as required by the Legal Practitioners' Act, section 28, *Raghunath Saran Singh v. Sri Ram*, I. L. R., 28 All., 704, and *Rasul-ud-din v. Karim Bakhsh*, I. L. R., 12 All., 169, referred to.

Chhannu Lal *v.* Ashaq Lal, I. L. R., 29 All. 640

———1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTION 80—*Act No. XXVIII of 1855 (Usury Laws Repeal Act) Interest —Rate of interest — Hundis silent as to interest — Collateral contemporaneous agreement fixing rate.*] In a suit on certain *hundis* which were silent as to interest, but as to which there was a collateral written agreement that they should bear interest at 30 per cent. per annum; and it was found that this was the mode of dealing with interest by a collateral agreement and not on the face of the *hundis* was in accordance with the custom prevailing in the district, and among the class, affected by the suit,

Held that by Act XXVIII of 1855 interest was recoverable at the rate agreed upon by the parties, and section 80 of the Negotiable Instruments' Act (XXVI of 1881) was not applicable.

That section purports to confer a right to interest, not to take away such a right otherwise existing, nor to deprive a plaintiff of a right to interest which he has acquired by contract.

Ghulshiam Lalji *v.* Ram Narain, I. L. R., 2 All ... 32

———1882—IV (TRANSFER OF PROPERTY ACT), *Chapter II, passim —Mortgage—Mortgage of mortgagee rights—Right of sub-mortgagee to bring to sale the mortgagee rights of his mortgagor—*

" Property"] *Held* by the Full Bench, STANLEY, C J, and KNOX, BANERJI, BURKITT, AIKMAN, and RICHARDS, JJ, that a sub-mortgagee of mortgagee rights in immovable property is entitled to a decree for sale of the mortgagee rights of his mortgagor.

Per STANLEY, C J,—In a properly constituted suit a puisne mortgagee or sub-mortgagee may have sale of the interest mortgaged to them respectively, subject, in the case of a puisne mortgage to the rights of a prior incumbrancer, and subject, in the case of a sub-mortgage, to the rights of redemption of the original mortgagor

Mata Din Kasodhan v *Kazim Husain*, I. L R, 18 All ,432, considered and dissented from *Ganga Prasad* v *Chunni Lal*, I. L R, 18 All., 113, discussed and distinguished *Raghunath Pr sad* v *Jurawan Rai*, I L R, 8 All , 105, *Sribath Rai* v *Raghunath Prasad*, I L R, 7 All , 868, at page 874, *Jones* v *Skinner*, 5 L. J , Ch , 90, *Taylor* v. *Russell*, L. R, 1892, A C , 265, *Ivre Sargent*, 17, Eq , 279, *Rose* v. *Page*, 2 Simons, 471 , 29 R R, 142, *Slade* v. *Rigg*, 3 Hare, 35; 64 R. R., 208, *Ivre Hodson and Howes' Contract*, 1 L R , 35 Ch. D ,668, *Vencatachella Kandan* v *Panjnadien*, I. L R , 4, Mad, 213, *Kant's Ram* v *Aut-ud-din Mohomed*, I L. R., 22 Calc., 33, *Bon Madhub Mahapatra* v *Sourendra Mohan Tagore*, I L R., 23 Calc, 795, *Debendra Narain Roy* v *Ramtaran Banerjee*, I L. R., 30 Calc, 599, *Juggeswar Dutt* v. *Bhuban Mohun Mitra*, I L. R., 33 Calc, 425, *Muthu Vaya Raghunatha Rambendra Vurha Muhalu Thuran* v. *Venkatachalam Chetti*, I L R., 20 Mad., 35, and *Raj Coomary Dassee* v. *Proo Madhub Nundy*, 1 C. W. N , 435, referred to.

Ram Shankar Lal v Ganesh Prasad, I L R, 29 All. .. 385

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 6 *(d)*, *See* Muhammadan law 640

---------- ... ... SECTION 41 — *Transfer by ostensible owner—Owners of property transferred, minors—Guardian incapable of asserting to apparent ownership of transferor.*] *Held* that the guardian of a minor owner of immovable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of section 41 of the Transfer of Property Act, 1882.

Dambar Singh v. Jawtri Kunwar, I. L. R., 29 All. ... 232

---- ... ... SECTION 52, *See* Lis pendens 389

---- ... ... SECTION 52, 86 AND 87—*Lis pendens—Suit for foreclosure—Suit not terminated until decree absolute.*] A suit for foreclosure of a mortgage is not terminated until the passing of the decree absolute. A purchase, therefore, of the mortgaged property made after the passing of the decree nisi, but before such decree is made absolute, is subject to the doctrine of lis pendens. *Higgins* v. *Shaw*, 2 Dr. and War., 356, *Chunni Lal* v. *Abdul Ali Khan*, I L. R., 23 All., 331, and *Shivram Sahebram Marwadi* v. *Wuman Narayan Joshi*, I. L. R., 22 Bom., 930, followed. *Bellamy* v. *Sabine*, 1 De G. and J., 566, referred to

Parsotam Narain v. Chheda Lal, I. L. R, 29 All ... 76

---- ... ... SECTION 60 — *Mortgage — Redemption — Effect of purchase by mortgagees of part of the mortgaged property.*] When the integrity of a mortgage has been broken up upon the purchase by the mortgagees

of the equity of redemption in a portion of the mortgaged property, the right of redemption of each of the several mortgagors is confined to his own interest in the mortgaged property; he cannot redeem the remainder of the mortgaged property against the wishes of the mortgagees. *Nawab Azimat Ali Khan* v. *Jowahir Singh*, 12 Moo. I. A., 404, *Kuray Mal* v. *Puran Mal*, I. L. R., 2 All., 585, and *Girish Chunder Dey* v. *Jurymoni Da*, 5 C. W. N., 83, followed.

Munshi v. Daulat, I. L. R., 29 All. 263

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 62 AND 63—*Mortgage—Redemption—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 134—Mortgage by mortgagee purporting to be of a proprietary interest in the mortgaged property—Foreclosure.*] Under ordinary circumstances a mortgagor cannot before the time limited for payment to the mortgagee expires, take proceedings to redeem the mortgage. *Brown* v. *Cole*, 14 Sim., 427, *Vadju* v. *Vadju*, I. L. R., 5 Bom., 22, *Raghubar Dayal* v. *Rudhu Lal*, I. L. R., 3 All., 95, and *DeBraam* v. *Ford*, [1900] 1 Ch., 142, referred to.

The widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to *A. K.* The donee mortgaged part of the property, the subject of this gift, to *P. N.* purporting to mortgage the full proprietary interest in the property. *P. N.* took proceedings for foreclosure against *A. K.* as absolute owner and obtained foreclosure and possession of the property. *Held*, on the finding that *P. N.* acted *bonâ fide* and had no reason to suppose that *A. K.* was not, as he represented himself to be, the full owner of the property mortgaged, that *P. N.* was entitled as against the representative of the original mortgagor to the protection afforded by article 134 of the second schedule to Act No. XV of 1877.

Ahamad Kutti v. *Raman Nambadri*, I. L. R., 25 Mad., 99, and *Ram Chandra Vithal* v. *Sheikh Mohidin*, I. L. R., 23 Bom., 614, distinguished. *Bhagwan Sahai* v. *Bhagwan Din*, I. L. R., 9 All., 97, *Radanath Dass* v. *Gisborne & Co.*, 14 Moo., I. A., 1, *Yesu Ramji Kainath* v. *Balkrishna Lakshman*, I. L. R., 15 Bom., 235, *Bohari Lal* v. *Muhammad Mustahi*, I. L. R., 20 All., 453, *Malayi* v. *Fakir Chand*, I. L. R., 22 Bom., 236, *Muscattraman Ittan Thamburan* v. *Ammu*, I. L. R., 24 Mad., 471, and *Narayan* v. *Shri Ram Chandra*, I. L. R., 27 Bom., 373, referred to.

Husaini Khanam v. Husain Khan, I. L. R., 29 All. ... 471

SECTIONS 86 AND 88—*Decree for sale on a mortgage — Rate of interest after date fixed for payment.*] Where a decree for sale on a mortgage gives interest after the date fixed by the decree for payment of the mortgage debt, it is not necessary that such interest should be at the contractual rate. *Ramessoor Koer* v. *Mahomed Mahdi Hossein Khan*, I. L. R., 26 Calc., 39, and *Sundar Koer* v. *Rai Sham Krishen*, I. L. R., 24 Calc., 160, referred to.

Lachmi Narain v. Uman Dat, I. L. R., 29 All. 322

SECTION 88—*Mortgage—Charge—Suit for sale of property subject to a charge.*] There is no objection to the sale, in execution of a decree for sale on a mortgage, "subject to the charge" of property which is liable to a charge for maintenance in favour of a particular person. *Mata Din Kasodhan* v. *Kasim Husain*, I. L. R., 18 All., 432, distinguished.

Lalman v. Mohar Singh, I. L. R., 29 All. 305

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 88 AND 90—*Execution of decree—Decree to be executed a combination of a decree for sale and a personal decree*] Where a decree in a suit for sale of hypothecated property is both a decree for sale of the property under section 88 and a personal decree under section 90 of the Transfer of Property Act, 1882, there is no need for the decree-holder to apply for a separate decree under section 90, and if he does so and his application is rejected, this will not operate as a bar to his executing the decree against the judgment-debtor personally

Sadho Singh v. The Maharaja of Benares, I. L. R., 29 All ... 12

SECTION 90—*Mortgage—Mortgaged property totally incapable of being sold—Decree under section 90 not obtainable*] Where property mortgaged was property which the mortgagee could by no possibility bring to sale in execution of a decree under his mortgage, it was *held* that no decree over under section 90 of the Transfer of Property Act, 1882, could be granted, *Kedar Nath* v. *Chandu Mal*, I. L. R., 26 All., 25, distinguished.

Prabhu Narain Singh v. Baldeo Misra, I. L. R., 29 All. ... 260

SECTION 90—*Decree for sale on a mortgage—Property ordered to be sold in part not susceptible of sale—Abandonment of claim to sell such part.*] *Held* that on the true construction of the provisions of the Transfer of Property Act, 1882, a mortgagee is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under section 90 for any balance due after crediting the amount realized by the sale of the property actually sold *Muhammad Akbar* v. *Munshi Ram*, Weekly Notes, 1899, p. 208, distinguished. *Sheo Prasad* v. *Behari Lal*, I. L. R., 25 All., 79, *Kedar Nath* v. *Chandu Mal*, I. L. R., 26 All., 25, and *Ghafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan*, I. L. R., 28 All., 19, referred to.

Prabhu Narain Singh v. Amir Singh, I. L. R., 29 All ... 369

SECTION 91—*Mortgage—Redemption—Who may redeem—Perpetual lessee*] In a suit for redemption of a mortgage the plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon payment of a premium of Rs. 800, with a yearly rental of Rs. 40 odd. By the terms of the lease the lessee was not liable to be ejected, even for non-payment of rent, while, if the title of the lessor proved defective, the lessee was entitled to a refund of the premium.

Held that the lessee was under the above circumstances entitled to redeem.

Paya Matathil Appu v. *Kovamal Amma*, I. L. R., 19 Mad., 151, *Radha Pershad Misser* v. *Monohar Das*, I. L. R., 6 Calc., 317, *Jugal Kissore Lal Singh Deo* v. *Kartic Chunder Chottopadhya*, I. L. R., 21 Calc. 116, *Kamumunnissa Bibee* v. *Nilratna Bose*, I. L. R., 8 Calc., 79, *Grish Chunder Dey* v. *Juramoni De*, 5 C. W. N., 83, and *Ram Subhag* v. *Nar Singh*, I. L. R., 27 All., 472, referred to.

Raghunandan Prasad v. Ambika Singh, I. L. R., 29 All. ... 679

SECTIONS 92 AND 93—*Usufructuary mortgage—Redemption—Form of decree in a suit for redemption*] An order declaring that the plaintiff's right to redeem shall be extinguished upon non-payment within the time limited by a decree for redemption of the amount found to be due

is not a proper order when the mortgage sought to be redeemed is a usufructuary mortgage. Nevertheless where such an order has been made and the decretal money has not been paid within the time limited and the decree has been allowed to become final the plaintiff cannot thereafter bring a second suit for redemption. *Sita Ram* v. *Madho Lal*, I. L. R., 26 All., 44, referred to.

Lachman Singh v. Mahadulan, I. L. R., 26 All. 481

ACTS—1882—V (INDIAN EASEMENTS ACT), SECTION 4—*Easement—Right of privacy—Suit by occupier of house.*] Not only the owner, but the lessee or other person in lawful possession of premises may maintain an action if his right of privacy is interfered with. *Gokal Prasad* v. *Radha*, I. L. R., 10 All., 358, referred to.

Kundan v. Bahi Chand, I. L. R., 26 All. 64

——— SECTIONS 15 AND 28(*c*)—*Easement—Prescriptive right to light and air—Interference with right—Actual damage.*] Where a plaintiff has enjoyed uninterrupted upon the ground that his pre-emptive right to the passage of light and air to a certain window has been interfered with sufficient enough to show that the right has in fact been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby. *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C., 179 and *Kuay* v. *Jolly*, [1905] 1 Ch., 480 not applied. *Nundkishor Rajgovan* v. *Bhagubhai Trust Gobhidas*, I. L. R., 8 Bom., 95, referred to.

Kunna Lal v. Kundan Bibi, I. L. R., 29 All. ... 671

——— SECTION 60—*Landholder and tenant—Occupation of building site in abadi—Erection of permanent building—Suit for ejectment.*] The defendants were found on the evidence to be tenants at will of the plaintiff of land in the abadi, the land having been allowed to them originally on condition of their rendering service as patwari. The defendants had ceased to perform the duties of patwari, but still occupied the land, and had built houses thereon of a permanent character. *Held* on suit by the zamindar to eject the defendants, who had denied the zamindar's title, that the principles laid down in *Beni Ram* v. *Kundan Lal*, I. L. R., 21 All., 496, applied, and that there was no such conduct on the part of the zamindar as would justify the inference that she had contracted that the right of tenancy under which the defendants originally obtained possession of the land should be changed into a permanent right of occupation, neither could the defendants rely in aid section 60 of the Indian Easements Act, 1882. *Held* also that the acquisition pending the suit by one of the defendants of a share in the village in which the land in suit was situate did not give the defendants any title to retain possession of the site in the abadi from which the plaintiff was using to eject them.

Budh Singh v. Pachaiti, I. L. R., 29 All. 652

——— SECTION 60, *See* Landholder and tenant 183

——1890—VIII (GUARDIANS AND WARDS ACT), SECTION 10—*Guardian and minor—Muhammadan Law—Paternal uncle and mother's brother.*] The paternal uncle has no legal right under the Muhammadan law to the guardianship of the property of his minor nephews and nieces superior to that of their mother. *Sheikh Alimudeen Mookerjea* v. *Syfoora Bibee*, 6 W. R., M. R., 125, referred to.

Abia-ullah Khan v. Abadi Begam, I. L. R., 29 All. ... 10

——— SECTION 10 *Guardian and minor—Discretion of Court as to appointment of guardian* ... 10

this case the High Court set aside the appointment of the father as guardian of his own daughter, aged 10 years, upon the grounds chiefly that the father had married again and that under the circumstances the child was likely to be happier with her maternal grandmother, with whom she had been living since the age of 3, than with her father

Bindo v. Sham Lal, I. L. R., 20 All 210

ACTS—1890—VIII (GUARDIANS AND WARDS ACT), SECTION 52—*Act No. IX of 1875 (Indian Majority Act), section 3—Guardian and minor—Effect of appointment of guardian—Civil Procedure Code, section 440.*] Where a guardian has once been appointed under the provisions of Act No VIII of 1890, the attainment of majority by the ward is postponed until he reaches the age of twenty-one years notwithstanding that the guardian appointed by the Court may be discharged before that time arrives. *Gurdiandas Jadwaya v. Harmalabhdas Bhadas*, I. L. R., 21 Bom., 231, followed *Pateari Partap Narain Singh v. Champa Lal*, Weekly Notes, 1891, p 118, distinguished.

Sadho Lal v. Murlidhar, I. L. R., 20 All. 672

——1893—IV (PARTITION ACT), SECTION 4—*"Dwelling house belonging to an undivided family"—Muhammadans.*] *Held* that the expression "a dwelling house belonging to an undivided family" as used in section 4 of the Partition Act, 1893, is not applicable to a house belonging to a Muhammadan family *Amma Beham v. Zia Ahmad*, I. L. R., 13 All., 282, referred to.

Hashmat Ali v. Muhammad Umar, I. L. R., 20 All ... 608

——(LOCAL)—1891 I (N.-W. P. AND OUDH WATER WORKS ACT), SECTIONS 34, 40 AND 41—*Construction of Statutes—Omission to give notice of re-occupation of house—Water rate paid during period of non-occupation.*] *Held* that the provisions of section 41 of the North-Western Provinces and Oudh Water Works Act, 1891, would not apply to the case of a person who had in fact regularly paid the water rate due in respect of the house during the period of its non-occupation.

Emperor v. Sumer Chand, I. L. R., 20 All 375

——1903—III (COURT OF WARDS ACT), SECTIONS 9, 35 AND 47. *See* Act No. XIX of 1873, sections 194 *(g)* and 203 589

——1900—I (UNITED PROVINCES MUNICIPALITIES ACT), SECTION 47—*Contract—Mode of execution by Board.*] Where a contract entered into with a Municipal Board for the supply of material for road-making was endorsed both by the Secretary and the Vice-Chairman of the Board and this endorsement referred to the contents of the contract and its confirmation. *Held* that this was a sufficient compliance with the requirements of section 47 of the Municipalities Act

The Municipal Board of Najibabad v. Sheo Narain, I. L. R., 20 All. 346

——SECTIONS 82, 87(3)—*Application for permission to build—Implied permission—Power to erect necessary scaffolding.*] Where application for permission to build has been made to a Municipal Board and the procedure laid down in section 87(3) of the Municipalities Act, 1900, has been complied, the applicant is in the same position as if the erection of the building specified in his application had been formally sanctioned by the Board. A sanction, express or implied, to the erection of a specified building necessarily carries

with it a right to put up such ordinary scaffolding as would be necessary under ordinary circumstances for the execution of the work.

Emperor *v.* Gokul, I. L. R., 29 All. 737

ACTS—(LOCAL)—1900—I—(UNITED PROVINCES MUNICIPALITIES ACT), SECTION 167, *See* Act No. XLV of 1860, sections 425, 426 ... 565

ACTS—(LOCAL) 1901—II (AGRA TENANCY ACT), SECTIONS 20, 21 AND 31—*Occupancy holding—Rights of alienation possessed by occupancy tenants—Mortgage.*] *Held* that the law enacted in sections 20 and 21 of the Agra Tenancy Act, 1901, obliterates any distinction which might have existed or have been supposed to exist between the right of occupancy and the right to occupy wherever transfers were made or contemplated by tenants, and that the tenants mentioned in these sections can no longer transfer either the right of occupancy or the right to occupy otherwise than by a sub-lease.

A subsequent mortgagee of an occupancy holding, whose mortgage was executed after the coming into force of the Agra Tenancy Act, has, therefore no right to redeem a prior mortgage over the same holding. *Khiali Ram* v. *Nathu Lal*, I. L. R., 16 All., 219, and *Brij Mohan Das* v. *Ajun*, I. L. R., 26 All., 78, distinguished. *Madan Lal* v. *Muhammad Ali Nasir Khan*, Weekly Notes, 1906, p. 182, approved.

Banmali Pande *v.* Bishesher Singh, I. L. R. 29 All. ... 120

SECTIONS 20, 21 AND 31—*Occupancy holding — Usufructuary mortgage—Act No. IX of 1872 (Indian Contract Act), section 23.*] An occupancy tenant executed a usufructuary mortgage of his occupancy holding, and then executed a kabuliat undertaking to pay rent for the mortgaged land. *Held*, on suit by the mortgagee for rent under the terms of the kabuliat, that the agreement between the parties was of a nature which, if permitted, would defeat the provisions of the Tenancy Act, 1901; that it was unlawful within the meaning of section 23 of the Contract Act, and void. *Hanumandas Rai* v. *Nahakedi Rai*, Weekly Notes, 1906, p. 202, *Banmali Pande* v. *Bishesher Singh*, I. L. R., 26 All., 129, and *Madan Lal* v. *Muhammad Ali Nasir Khan*, I. L. R., 28 All., 696, followed.

Ram Sarup *v.* Kishan Lal, I. L. R., 29 All. 327

SECTION 32 *Occupancy holding—Jurisdiction—Civil and Revenue Courts.*] Where plaintiffs sued in a Civil Court for possession under an agreement of part of an occupancy holding, *Held* that the suit would not lie, being contrary to the intention of section 32 of the Agra Tenancy Act, 1901.

Achhoy Lal *v.* Janki Prasad, I. L. R., 29 All. ... 66

SECTIONS 164 (2) AND 166—*Lambardar and co-sharer—Liability of successor in office for uncollected profits.*] *Held* that the successor in title of a deceased lambardar is not liable to account for profits which his predecessor may have failed to collect or which he permitted to remain uncollected owing to negligence or misconduct.

Dip Singh *v.* Ram Charan, I. L. R., 29 All. 16

SECTIONS 176, 177 AND 182—*Jurisdiction—Appeal.*] *Held* that no third appeal will lie to the High Court from a decree of the District Judge passed in

appeal from an appellate decree of the Collector under the provisions of the Agra Tenancy Act, 1901. *Lachmi Narain* v *Nirotam Das*, Weekly Notes, 1906, p 251, followed.

Lachmi Narain v. Nirotam Das, I. L. R., 29 All. ... 60

ACTS—(LOCAL)—1901 II (AGRA TENANCY ACT) SECTIONS 198 AND 57 —*Civil Procedure Code, section 43—Joint suit for arrears of rent of several holdings*] *Held* that the provisions of section 43 of the Code of Civil Procedure do not apply to a suit for arrears of rent under the Agra Tenancy Act, 1901, so as to admit of a joint suit being brought in respect of arrears of rent due in respect of several holdings On the contrary, the Act contemplates that one suit should be brought in respect of each separate holding.

Jugan Nath Prasad v. Tori, I. L. R., 29 All. 18

——— SECTION 199—*Determination by Revenue Court of question of proprietary title—Res judicata.*] Where in a suit filed in a Revenue Court a question of proprietary title is raised and the Court, acting under section 199 of the Agra Tenancy Act, elects to determine such question itself, such decision of the Revenue Court will operate as *res judicata* in respect of a subsequent suit in a Civil Court for determination of the same question *Sahig Dube* v. *Deoki Dube*, Weekly Notes, 1907, p. 1, followed.

Beni Pande v. Raja Kansal Kishore Prasad Mal Bahadur, I. L. R., 29 All. 160

——— SECTION 199—*Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself—Res judicata.*] In a suit for ejectment under Act No. II of 1901 the defendants did not plead their own title to the plot in suit, and in fact did not oppose the suit for ejectment. *Held* that a subsequent suit brought in a Civil Court by the then defendants for proprietary possession of the same plot was barred by the principle of *res judicata*. *Rani Kishori* v *Raja Ram*, Weekly Notes, 1904, p. 109. *Ashraf-un-nissa* v *Ali Ahmad*, Weekly Notes, 1904, p. 141, and *Inayat Ali Khan* v *Murad Ali Khan*, I. L. R., 27 All., 569, distinguished *Sahig Dube* v. *Deoki Dube*, Weekly Notes, 1907, p. 1, and *Beni Pande* v *Raja Kansal Kishore Prasad Mal Bahadur*, I. L. R., 29 All., 160, referred to. *Jukul Mandar* v. *Tudmanund Singh*, I. L. R., 29 Calc., 707, discussed.

Bihari v Sheobalak, I. L. R., 29 All. 601

——— SECTION 201—*Act No. I of 1872 (Indian Evidence Act), section 4—Evidence—Record of plaintiff's name as co-sharer—Presumption.*] The presumption conjured by clause (3) of section 201 of the Agra Tenancy Act is not conclusive, even in a Revenue Court, but may be rebutted, as for instance, by evidence showing that the plaintiff has not been in possession of the property in respect of which profits are claimed for more than twelve years before suit, and the defendants have openly denied the plaintiff's title for more than that period. *Niaz Ali Khan* v *Gobind Ram*, F. A. f. O. No. 70 of 1905, decided May 22, 1905, distinguished.

Dal Kunwar v. Udait Ram, I. L. R., 29 All. 148

——— SECTION 201—*Suit for profits—Receipt of profits within 12 years of suit denied—Plaintiff's recorded co-sharers—Burden of proof*] The plaintiffs—recorded co-sharers—sued another co-sharer for profits. The defendant pleaded that the plaintiffs or their predecessors in title had

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not received profits within twelve years preceding the institution of the suit, and that the suit was time-barred. *Held* that it was not for the plaintiffs to prove by evidence of receipt of profits within twelve years that the right subsisted; and that section 201 of the Agra Tenancy Act, 1901, raised a presumption in their favour. *Mikis Lal* v. *Bedri Prasad*, I. L. R., 27 All. 436, referred to.

Rajwali Lal v. Nindar, I. L. R., 29 All. 188

ACTS - (LOCAL)—1901—II (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 110, 111, 233*(k)*—*Partition—Objections not raised before Revenue Court—Suit in Civil Court for declaration of title—Jurisdiction.*] On the 12th of March 1904 defendants applied to the Revenue Court for partition of their share in two mahals. Proclamation was issued on that application calling upon the opposite party to appear on the 18th of April 1904 and state their objections, if any, to the partition. The opposite party did not appear in the Revenue Court, but on the 20th of April 1904 instituted a suit in a Civil Court against the applicants for partition asking for a declaration of their exclusive possession over part of the property, the subject-matter of the defendants' application for partition in the Revenue Court. *Held* that the plaintiffs' suit was not maintainable. *Muhammad Sadiq* v. *Imtiz Khan*, I. L. R., 22 All., 201, and *Khanay* v. *Jugla*, I. L. R., 28 All., 432, referred to.

Nathi Mal v. Tej Singh, I. L. R., 29 All. 604

SECTIONS 147, 227 AND 228—*Act No. XLV of* 1860 *(Indian Penal Code), section* 353 *—Attachment—Power of Tahsildar to issue warrants of attachment for realization of revenue.*] *Held* that a Tahsildar has no power under the United Provinces Land Revenue Act, 1901, to issue a warrant of attachment in order to realise arrears of Government revenue, nor is a warrant issued by a Tahsildar validated by general authority to that effect given to him by the Collector of the District.

Emperor v. Radhe Lal, I. L. R., 29 All. 772

ADMISSION, *See* Burden of proof 184

ADOPTION, *See* Civil Procedure Code, section 13 819

——— *See* Hindu Law 810, 405

ADVERSE POSSESSION, *See* Act No. XV of 1877, schedule II, article 144 503

——— *See* Landholder and tenant ... 132

——— *See* Muhammadan Law 640

ADVOCATE—*Power of High Court to deal with Advocate who is also a member of the English Bar—Constitution of Bench of High Court under Rules of Court — Rules* 2, 180, 181, 197 *— Letters Patent, clauses* 7 *and* 8 *— Advocate charged with misconduct — Libellous article written by advocate in newspaper edited and published by himself—Contempt of Court—"Reasonable cause" for suspension.*] The High Court at Allahabad is not precluded from dealing under the Letters Patent of the Court with an Advocate of the court for misconduct by reason of his being a member of the English Bar.

By rule 2 of the High Court rules a Bench of three Judges of the Court is a tribunal properly constituted to deal with a charge of misconduct made against an advocate of the Court. Rule 197 does not make a Bench of five Judges necessary in such a case, but only provides for cases in which the High Court may for good

cause and without charge or trial suspend or remove from the roll any advocate of the Court.

After an altercation, during the hearing of a case, with one of the Judges of the High Court, in the course of which he alleged that he had been told by the Judge to "hold his tongue" and to "sit down" an advocate of the Court attempted to defend his conduct by publishing in a newspaper, of which he was the editor, an article which was a libel reflecting not only on the Judge before whom he had appeared but upon other Judges of the Court in their judicial capacity, and in reference to their conduct in the discharge of their public duties, and which amounted to a contempt of Court, which might have been dealt with as such by the High Court. *Held* that such publication constituted under clause 8 of the Letters Patent of the Court "reasonable cause" for an order suspending the advocate from practising.

Such publication was not excusable on the ground that it was written in his capacity as editor of the newspaper and not in his capacity as an advocate. The controversy arose from the misbehaviour of the advocate conducting a case before the Court, and the contempt of which he was found guilty was committed in the attempt to vindicate his professional conduct in a publication for which he was solely responsible. *In re Wallace*, L. R., 1 P. C., 288, distinguished.

Surbadhicary In the matter of S. B.——, I. L. R., 29 All. 95

"ALIENATION," *See* Act No. XV of 1877, schedule II, article 126 ... 230

ANCESTRAL PROPERTY, *See* Hindu Law 244, 697

——— ——— ——— *See* Civil Procedure Code, sections 320 and 325A 415

APPEAL, *See* Act No. XV of 1877, sections 5 and 14 638

——— *See* Civil Procedure Code, sections 103, 310 and 588 (8) ... 590

——— *See* Civil Procedure Code, sections 241 and 318 207

——— *See* Civil Procedure Code, sections 310A and 244 (c) ... 275

——— *See* Civil Procedure Code, sections 521 and 522 426

——— *See* Civil Procedure Code, sections 521 and 522 ... 457

——— *See* Civil Procedure Code, section 522 564

——— *See* Civil Procedure Code, section 562 659

——— *See* Act (Local) No. II of 1901, sections 176, 177 and 182 ... 99

ARBITRATION, *See* Act No. 1 of 1877, section 21 13

——— *See* Civil Procedure Code, section 506 423

——— *See* Civil Procedure Code, section 506 429

——— *See* Civil Procedure Code, sections 521 and 522 ... 426

——— *See* Civil Procedure Code, sections 521 and 522 ... 457

——— *See* Civil Procedure Code, section 522 584

ATTACHMENT, Warrant of—, *See* Act (Local) No. III of 1901, sections 147, 227 and 228 272

——— before judgment, *See* Act No. XV of 1877, schedule II, article 29 615

AWARD, *See* Civil Procedure Code, sections 521 and 523 426

——— *See* Civil Procedure Code, sections 521 and 522 457

——— *See* Civil Procedure Code, section 522 584

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BENGAL REGULATIONS, 1793—V (BENGAL WILLS AND INTESTACY REGULATION), SECTION 7—*Escheat—Property taken possession of by District Judge—Period from which title vests in the Secretary of State.*] Where property of a person dying intestate is taken charge of by a District Judge acting under section 7 of Regulation No. V of 1799, such property does not vest in the Secretary of State until the period prescribed by the Regulation has expired.

Ram Narain Dube v. The Secretary of State for India in Council, I. L. R., 29 All. 277

——— 1806—XVII, SECTION 8—*Mortgage by conditional sale—Foreclosure—Parwanah—"Official signature"—Procedure.*] *Held* that a *parwanah* or notification to the mortgagor, issued in a suit for foreclosure of a mortgage by conditional sale under the provisions of section 8 of Regulation XVII of 1806, which bore the seal of the Court and the initials of the Judge of the Court from which it issued, was a good and sufficient notification within the meaning of the Regulation. *Madhoprasad* v. *Gajadhar*, I. L. R., 11 Calc., 111, distinguished. *Kubra Bibi* v. *Wajid Khan*, I. L. R., 16 All., 59, *quoad hoc* overruled.

Bhagwat Kuri v. Baldeo Rai, I. L. R., 29 All. ... 146

BIRT ZAMINDARI, *See* Act No. I of 1869 709

BOND—*Unconscionable bargain—Circumstances under which relief may be granted by the Court.*] A person of the age of some twenty-eight years, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of Rs. 500, with interest, which amounted to Rs. 37-8-0 per cent. per annum, with six-monthly rests. The bond further contained a stipulation that the borrower should not be empowered to repay the money within three years. And if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate mentioned. *Held* that although it could not be said that the execution of this bond was procured by means of undue influence or that the rate of interest was penal, nevertheless the bargain was an unconscionable bargain against which the Court might properly give relief. The High Court affirmed the decree of the lower appellate Court which gave the plaintiff the principal sum with simple interest at the rate of 24 per centum per annum. *Madho Singh* v. *Kashi Ram*, I. L. R., 9 All., 228, *Kirpa Ram* v. *Sami-ud-din Ahmad Khan*, I. L. R., 23 All., 284, *Kamini Sundari Chaudhrani* v. *Kali Prosunno Ghose*, I. L. R., 12 Calc., 225, *Kunwar Ram Lal* v. *Nil Kanth*, L. R., 20 I. A., 119, and *Rajah Mokham Singh* v. *Rajah Rup Singh*, L. R., 20 I. A., 127, referred to.

Balkishan Das v. Madan Lal, I. L. R., 29 All. ... 308

——— *See* Act No. XV of 1877, schedule II, article 75 431

BURDEN OF PROOF—*Admission by party to suit, effect of as shifting burden of proof—Admission not causing estoppel—Presumption as to admission by party—Right to rebut presumption—Question tried without specific issue—Remand—Civil Procedure Code, sections 55, 562, 566.*] In a suit for property to which the plaintiff alleged he was entitled by inheritance from his natural father the defence was that he had been adopted into another family and therefore was no longer his natural father's heir, and this contention was supported mainly by the plaintiff's admissions made in deeds and other documents signed by him, to none of which, however, the defendant was a party.

Held by the Judicial Committee that although the *onus* was on the defendant to prove the adoption the proof of the admissions shifted the *onus* on to the plaintiff on the principle stated in *Slatterie* v *Pooley*, 6 M & W, 664, at p. 669, that "what a party himself admits to be true may reasonably be presumed to be so," and until the presumption was rebutted the fact admitted must be taken to be established

Held also that where, as in the present case, there was no estoppel, the defendant being no party to the deeds, the plaintiff could give evidence to rebut such presumption.

Heane v *Rogers*, 9, B & C, 577, at p 586, *Newton* v. *Liddiard* 12 Q B, 926. In re *Simpson*, L. R., 2 Ch. D., 72, at p. 89, and *Trinidad Asphalte Company* v *Coryat*, [1895] A. C, 587, followed.

In this case their Lordships held that the plaintiff, so far from rebutting the presumption, had, in order to account for the admission made in the documentary evidence, put forward two different and inconsistent explanations, one of which was absurd and the other in its most important parts unproved, and had failed to prove his title.

Where no specific issue had been framed on the question of adoption, but the matter had been tried and determined without any objection on the part of the plaintiff, who had not been taken by surprise, but was fully informed by the defendant's lists of documents, and from the cross-examination of his witnesses that the defence would be taken.

Held that under the circumstances it was undesirable that the case should be sent back to be re-tried on a special issue framed as to the adoption.

Chandra Kunwar v Chaudhri Nurpat Singh, I. L. R., 29 All 184

BURDEN OF PROOF *See* Act No. XLV of 1860, section 456 .. 46

See Act (Local) No. II of 1901, section 201 ... 158

——— *See* Pre-emption 618

CAUSE OF ACTION, *See* Civil Procedure Code, section 43 .. 266

——— *See* False imprisonment 44

See Possession 52

CHARGE, *See* Act No. IV of 1882, section 88 205

CHEATING, *See* Act No. XLV of 1860, sections 280 and 420 ... 141

CIVIL AND REVENUE COURTS, *See* Act (Local) No. II of 1901, section 32 86

See Act (Local) No. II of 1901, section 199 601

——— *See* Act (Local) No. III of 1901, sections 110, 111 and 233*(k)* 604

CHAUKIDAR, *See* Act No. XLV of 1860, section 223 377

CIVIL PROCEDURE CODE, SECTION 13—*Res judicata—Hindu law—Joint Hindu family—Nature of son's title.*] *Held* that the dismissal of a suit for redemption of a mortgage of joint family property brought by the father in a joint Hindu family alone, would not be a bar to a subsequent suit for redemption by the sons, inasmuch as the sons' title was not through their father, but was separate and independent. *Ram Narain* v. *Bishesher Prasad*, I. L. R., 10 All., 411, referred to.

Sundar Lal v. Chhitar Mal, I. L. R., 29 All. 1

CIVIL PROCEDURE CODE. SECTION 13—*Res judicata—Award of committee of talukdars appointed under section 3 of the Oudh Estates Act (I of 1869)—Question of adoption—Claim in former suit as adopted son—Estoppel—Evidence and proof of adoption—Evidence of adoptive where lapse of time precludes proof—Presumption as to probability from conduct of parties.*] In a suit by the appellant against the respondent for a share in certain family property the question was whether the respondent had been in 1853 validly adopted into another family.

Held that the committee of talookdars appointed under section 33 of Act I of 1869 (Oudh Estates Act) to decide on claims for maintenance is not such a Court as is described by section 13 of the Code of Civil Procedure (Act XIV of 1882), and their award refusing the respondent maintenance in his own family on the ground that he had been adopted into another was therefore not *res judicata* in the present suit. The committee had no jurisdiction to decide the question of adoption, and the affirmation of their award by the Financial Commissioner could not give judicial validity to their decision on a point outside their jurisdiction.

The fact that the respondent had in 1873 on the death of his alleged adoptive mother claimed to succeed her as the adopted son of her deceased husband, and so secure the succession to which the predecessor in title of the appellant was then entitled, though he did not oppose the respondent's claim, did not estop the respondent from denying the alleged adoption in this suit.

To establish the fact of a valid adoption it was essential for the appellant to show that it was made by the direction of the deceased husband of the adoptive mother, and that the respondent's father had given him in adoption. In the absence of proof, which the lapse of time made impossible, it was incumbent on the appellant before any presumption that those conditions were fulfilled was justified, to establish material probability that the adoption was likely to have been validly made, and that the conduct of the parties cognizant of the facts had at least been consistent with such an hypothesis. But the evidence rather showed the contrary; and no weight could be given to the statements of the respondent, as they fell short of founding an estoppel, and as he had asserted or denied the adoption just as it suited his purpose throughout the whole of the protracted litigation between the members of the family.

Harshankar Partab Singh *v.* Lal Raghuraj Singh, I. L. R., 29 All. 519

——— SECTION 13, *See* Hindu law 331

——— SECTION 43—*Suit to recover fees for medical attendance—Fees partly secured by a promissory note—Separate suits upon the promissory note and for the unsecured balance—Latter suit barred.*] *A*, a doctor, agreed with *B* to accompany *B* to Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days, *B* gave *A* a promissory note for Rs. 700, in respect of seven days' fees. *B*, who was a vakil, also promised to ... professionally in certain litigation. *B*, however, died before he could fulfil his agreement to render professional services. *A* sued *B*'s son upon the promissory note first, and subsequently in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares. *Held* that the second suit was barred by the provisions of section 43 of the Code of Civil Procedure so far as the fees for attendance at Hardwar were concerned, though not in respect of the other fees claimed.

Proonath Mukerji *v.* Bishnath Prasad, I. L. R., 29 All. ... 256

CIVIL PROCEDURE CODE, SECTION 45—*Misjoinder of causes of action—Multifariousness—Property claimed under one title from defendants professing to hold under various titles.*] The plaintiffs sued as heirs of their father to recover various portions of their father's estate from the hands of different alienees. *Held* that the fact that the defendants set up different titles to the various portions held by them would not make the suit bad for multifariousness. The plaintiffs had one cause of action, namely, the right on the death of their father to recover their shares of his property *Ganesha Lal* v. *Khairati Singh*, I. L. R., 16 All., 279, distinguished *Ishan Chunder Haora* v *Rameswar Mondol*, I. L. R., 24 Calc., 831, *Nundo Kesseer Nasker* v. *Banomali Gayen*, I. L. R., 29 Calc., 871, *Indar Kuer* v. *Gur Prasad*, I. L. R., 11 All., 33, and *Mazhar Ali Khan* v *Sayyad Hasan Khan*, I. L. R., 24 All., 358, referred to.

Parbati Kunwar v. Mahmud Fatima, I. L. R., 29 All. ... 267

SECTION 45, *See* Act (Local) No. II of 1901, sections 103 and 57 18

SECTION 54—*Rejection of plaint—Procedure—Plaint not to be rejected in part.*] *Held* that under section 54 of the Code of Civil Procedure a Court cannot reject a plaint in part

Raghubans Puri v. Jyotis Swarup, I. L. R., 29 All. ... 325

SECTIONS 55, 562, 566, *See* Burden of proof 184

SECTIONS 103, 310 AND 588 (8)—*Appeal—Order refusing to restore an application under section 310 which had been dismissed for default of appearance.*] *Held* that no appeal lies from an order refusing to restore to the file of pending applications an application under section 310 of the Code of Civil Procedure which has been dismissed for default of appearance. The principle applied in *Jung Bahadur* v. *Mohadeo Prasad*, I. L. R., 31 Calc., 207, *Nanjappa* v. *Gangappa*, I. L. R., 10 Bom., 433, and *Raja* v *Sarubhan*, I. L. R., 11 Mad., 319, followed

Ghasiti Bibi v. Abdul Samad, I. L. R., 29 All. 536

SECTION 108—*Suit to set aside decree on the ground of fraud—Sole question raised already disposed of in proceedings under section 108 of the Code of Civil Procedure.*] In a suit to set aside a decree upon the ground of fraud, the sole fraud alleged was with respect to service of summons on the defendant. This question had already been gone into and decided by two Courts adversely to the defendant upon application made by him under section 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable *Radha Raman Shaha* v. *Pran Nath Roy*, I. L. R., 28 Calc., 175, and *Khagendra Nath Mahata* v. *Pran Nath Roy*, I. L. R., 29 Calc., 385, distinguished.

Puran Chand v. Sheodat Roy, I. L. R., 29 All. 272

SECTION 108—*Decree ex parte—Application to set aside decree—Right of representatives to continue proceedings instituted by defendant.*] Where proceedings under section 108 of the Code of Civil Procedure have been initiated by the defendant the legal representatives of the defendant is entitled to continue such proceedings. *Janki Prasad* v. *Sukhram*, I. L. R., 21 All. 274, distinguished. *Ganoda Prasad Roy* v. *Shib Narain Mukerjee*, 1901, I. L. R. 29 Calc., 83, referred to.

Beti Jee v. Sham Bihari Lal, I. L. R., 29 All. 574

CIVIL PROCEDURE CODE, SECTION 108, *See* Decree *ex parte* ... 628

——— SECTIONS 244 AND 318—*Execution of decree—Procedure—Appeal—Dispute between two judgment-debtors as to right to property sold in execution*] In execution of a decree against *K* and *J* certain property of the judgment-debtors was sold, and was purchased by *G P* and this sale was confirmed. *G P* then applied under section 318 of the Code of Civil Procedure asking that *J* might be substituted for the applicant and possession given to her. To this application *K* objected, on the ground that she, at some time prior to the execution of the decree and sale of the property, had given a certain sum of money to *J* and that *J* had misappropriated this money and had purchased with it the property which was sold in execution of the decree. *Held* that no question was raised falling within the purview of section 244 of the Code of Civil Procedure and no appeal would lie from the order allowing the auction purchaser's application under section 318.

Kastura Kunwar *v.* Gaya Prasad, I. L. R., 29 All ... 207

——— SECTIONS 244 AND 583—*Possession of property taken without intervention of Court—Decree reversed on appeal—Suit for restitution—Discretion of Court.*] In a suit for redemption the plaintiff obtained a decree and took possession of the property in suit without the intervention of the Court. The decree, however, having been reversed on appeal, the defendant brought a regular suit to recover possession of the mortgaged property. *Held* that a regular suit was precluded by the provisions of sections 244 and 583 of the Code of Civil Procedure, but the Court of first instance would have exercised a proper discretion if it had treated the plaint as an application under section 583 of the Code. *Dhan Kunwar v. Hubbib Singh*, I. L. R., 22 All., 79, and *Narain v. Bhagwan*, I. L. R., 23 All., 141, referred to.

Sheodihal Sahu *v.* Bhawani, I. L. R., 29 All. 348

——— SECTIONS 290, 291, 244, AND 311, 312. *See* Execution of decree 166

——— SECTIONS 310A AND 244(*c*)—*Execution of decree—Order refusing to accept a deposit tendered under section 310A—Appeal*] *Held* that an order refusing to accept a deposit tendered under the provisions of section 310A of the Code of Civil Procedure is an order falling within the purview of section 244(*c*) of the Code and is appealable as such. *Gulzari Lal v. Maddo Ram*, I. L. R., 26 All, 447, and *Phul Chand Ram v. Nursingh Pershad Misser*, I. L. R., 28 Calc., 73, referred to. *Bashar-ud-din v. Jhori Singh*, I. L. R., 19 All., 140, not followed.

Imtiazi Begam *v.* Dhumun Begum, I. L. R., 29 All. ... 275

——— SECTION 108, *See* Decree *ex parte* ... 628

——— SECTIONS 311, 312 AND 313—*Execution of decree—Sale in execution—Objection against sale taken by the judgment-debtor that the property sold was not liable to be sold—Appeal.*] *Held* that a judgment-debtor who might have raised objections to a sale in execution of a decree against him, but who has refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable. *Ramchhashar Misr v. Brohu Bhagat*, I. L. R., 7 All., 847, and *Durga Charan Mandal v. Kali Prasanna Sarkar*, I. L. R., 28 Calc., 787, followed.

Umed *v.* Jas Ram, I. L. R., 29 All. 612

CIVIL PROCEDURE CODE, SECTION 316—*Execution of decree—Sale in execution—Decree reversed before confirmation of sale.*] *Held* that the title of an auction purchaser at a sale held in execution of a decree does not become absolute if the decree under which the sale took place is reversed at any time before a certificate of sale is granted to the purchaser.

Ram Sukh v. Ram Sahai, I. L. R., 29 All. 591

——— SECTION 317—*Joint decree—Purchase at sale in execution by one decree-holder—Suit for declaration that property purchased was joint.*] In execution of a joint decree on a mortgage one of the decree-holders obtained leave to bid at the auction sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage debt, interest and costs. Satisfaction of the decree was entered up and a purchaser took possession of the property. *Held* that section 317 of the Code of Civil Procedure did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. *Budh Singh Doodhooria v. Ganesh Chunder Sen*, 12 B. L. R., 317, referred to.

Achhanbar Dube v. Tapasi Dube, I. L. R., 29 All. ... 557

——— SECTION 318, *See* Execution of decree ... 463

——— SECTIONS 320, 325A—*Ancestral property—Execution of decree—Property taken under management by the Collector—Disabilities of the proprietor pending term of management.*] In pursuance of the power conferred upon him by rules framed by Government under section 320 of the Code of Civil Procedure, the Collector sanctioned a lease of certain zamindari property of the judgment-debtor for a period of seventeen years, the lease being executed in the name of the judgment-debtor but with the permission of the Collector.

Held that the disabilities imposed by the first paragraph of section 325A of the Code affected the judgment-debtor during the pendency of such leases; and *semble* that such disabilities continued so long as any of the debts for the satisfaction of which the judgment-debtor's property was taken under management by the Collector remained unpaid.

Ganga Prasad v. Ganga Bakhsh Singh, I. L. R., 29 All. ... 415

——— SECTION 336—*Insolvency—Security for filing application by judgment-debtor to be declared insolvent.*] The petitioner gave security for one Aziz, who had been arrested in execution of a decree. He deposited a sum of money in Court on condition that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. The judgment-debtor duly presented his application for a declaration of insolvency, but before any order could be passed on it he died.

Held that the condition of the security was not fulfilled, and the decree-holder was not entitled to the money deposited by the surety. *Krishnan Nayar* v. *Illiam Nayar*, I. L. R., 24 Mad., 637, referred to.

Ashiq Ali v. Moti Lal, I. L. R., 29 All. 466

——— SECTIONS 368, 582 AND 587—*Act No. XV of 1877 (Indian Limitation Act) schedule II, Article 175C—Application to bring on to the record the heirs of a deceased respondent—Limitation.*] *Held* that article 175C of the second schedule to the Indian Limitation Act applies as well to appeals from appellate decrees as to appeals from original decrees. *Surya Pillai* v.

Aiyakannu Pillai, I. L. R., 23 Mad., 520, dissented from. *Vakkalagadda Narasimham* v. *Vakkalagadda Subbi*, I. L. R., 28 Mad., 408, followed.

Madhuban Das v. Narain Das, I. L. R., 29 All. 535

CIVIL PROCEDURE CODE, SECTION 396—*Partition—Commission to make partition — Issue of commission to one person only.*] A Court issuing under section 396 of the Code of Civil Procedure a commission to make partition of immovable property not paying revenue to Government cannot legally issue such commission to one commissioner only.

Per RICHARDS, J.—But there is nothing to prevent the parties to partition proceedings agreeing that one commissioner only should be appointed; nor does it follow that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed.

Mulchand v. Muhammad Ali Khan, I. L. R., 29 All. ... 236

——— SECTION 411—*Suit in forma pauperis - Court fee—Property of defendant sold to realize court fee—Property sold subject to a mortgage - Rights of mortgagee.*] *Held* that the sale subject to a mortgage of property belonging to the defendant in suit brought *in formâ pauperis* for the purpose of realizing the court fee payable to Government by the plaintiff does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage. *The Collector of Moradabad* v. *Muhammad Dawn Khan*, I. L. R., 2 All. 196, overruled *Ganpat Putaya* v. *The Collector of Kanara*, I. L. R., 1 Bom., 7, distinguished.

Dost Muhammad Khan v. Mani Ram, I. L. R., 29 All. ... 537

——— SECTION 424—*Suit against public officer—Suit to recover articles seized by police during a search.*] The plaintiff sued to recover from the defendant three account-books which he alleged that the defendant, a Sub-Inspector of Police, had seized during a search, apparently in pursuance of the provisions of section 165 of the Code of Criminal Procedure, of the plaintiff's house. *Held* that the defendant, if he seized the books which was denied, did so in his capacity as a police officer and that the suit was not maintainable in the absence of the notice prescribed by section 424 of the Code of Criminal Procedure. *Muhammad Sadik* v. *Ahmad* v. *Panna Lal*, I. L. R., 26 All., 320, distinguished. *Jogendra Nath Roy Bahadur* v. *Price*, I. L. R., 24 Calc., 584, referred to.

Bakhtawar Mal v. Abdul Latif, I. L. R., 29 All. ... 567

——— SECTION 433—*Suit against a ruling chief—Permission to sue granted in absence of the necessary conditions precedent—Jurisdiction.*] A suit for the recovery of arrears of salary was brought in the Court of the Subordinate Judge of Agra against the Maharaja of Jaipur. The plaintiff obtained the consent of the Governor General in Council to the institution of the suit, granted ostensibly in accordance with the provisions of section 433 of the Code of Civil Procedure; but in fact none of the conditions enumerated in clause (2) of the section existed. *Held* that the suit was not maintainable.

Maharaja of Jaipur v. Lalji Sahai, I. L. R., 29 All. ... 379

——— SECTION 449, *See* Act No. VIII of 1890, section 52 672

——— SECTION 444—*Guardian ad litem—Duty of Court as regards appointment of a guardian ad litem.*] Where the defendant or respondent to a suit or appeal is a minor it is the duty

of the court not only to appoint a guardian, but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. *Mussammat Bibi Wahida* v. *Banke Behari Parshad Singh*, I. L. R., 21 Bom., 231, distinguished

Ramchandra Das v. Joti Prasad, I. L. R., 29 All. ... 675

CIVIL PROCEDURE CODE, SECTION 443—*Guardian ad litem—Appointment of guardian ad litem other than certificated guardian.*] *Held* that the appointment, apparently by an oversight, as guardian *ad litem* to a minor defendant of a person other than the certificated guardian amounted to no more than an irregularity and would not of itself vitiate either a decree passed in a suit or a sale consequent upon such decree.

Dammar Singh v. Pirbhu Singh, I. L. R., 29 All. ... 290

——— SECTION 457—*Guardian ad litem—Appointment of married woman whose husband is alive*] In no case can a married woman whose husband is living be appointed as a guardian *ad litem*, and if such an appointment is made *de facto* such appointment is not a mere irregularity. *Nham Lal* v. *Ghasita*, I. L. R., 23 All., 450, followed. *Kunhayi Kuttiali Haji* v. *Udumpunthala Kunhi Puttra*, I. L. R., 29 Mad., 58, dissented from

Kundan Lal v. Gajadhar Lal, I. L. R., 29 All. 728

——— SECTION 506—*Arbitration—Application for reference signed by pleader holding a defective vakalat-namah.*] An application under section 506 of the Code of Civil Procedure for a reference to arbitration was made by the parties to a pending suit. This application was signed on behalf of the defendants by some of the defendants personally, and on behalf of the others by a pleader. It appeared, however, that the pleader's vakalat-namah has not been signed by one of the defendants on whose behalf the pleader had signed. *Held* that, in the absence of any circumstance to estop the defendant who had not signed from objecting to the reference, the reference to arbitration and all subsequent proceedings founded thereupon were invalid. *Pitam Mal* v. *Sadiq Ali*, I. L. R., 24 All., 229, distinguished.

Kadhu Singh v. Baljit Singh, I. L. R., 29 All. 423

——— SECTION 506—*Arbitration — Authority of pleader to agree to reference*] A vakalatnamah in general terms is wholly insufficient to enable a pleader to apply for an order of reference to arbitration on behalf of his client under section 506 of the Code of Civil Procedure. Where, however, a reference was made on such authority and an award followed and a decree based on such award without any objection taken to the authority of the pleader to apply for a reference, the High Court refused to set aside such decree in revision.

Ramjiawan Ram v. Kali Charan Singh, I. L. R., 29 All. ... 429

——— SECTIONS 521 AND 522—*Arbitration—Award—Decree on judgment in accordance with award—Appeal.*] During the pendency of a suit in the Court of a Subordinate Judge the matters in dispute between the parties were referred to arbitration. In due course a document purporting to be the arbitrator's award was received by the Court through the post. Objections were filed by one of the defendants to the suit; but these objections were, after hearing, disallowed by the Court, which proceeded to pass a decree in accordance with the award,

Held that an appeal would lie from such a decree upon the ground that the so-called award was never delivered by the arbitrator and was in fact and in law no award at all.

Sham Lal *v.* Misri Kunwar, I. L. R., 20 All. 426

CIVIL PROCEDURE CODE, SECTIONS 521 AND 522—*Arbitration—Award—Decree on judgment in accordance with the award—Appeal.*] The matters in dispute between the parties to a suit pending in the Court of a Munsif were referred to arbitration. An award was delivered by the arbitrator to which objections were filed to the effect that the arbitrator had been guilty of misconduct. The objections were, however, overruled and a decree was passed which was in accordance with, and not in excess of, the terms of the ward.

Held that no appeal from such a decree would lie, the sole ground being that the arbitrator had been guilty of misconduct. *Sham Lal* v. *Misri Kunwar*, supra, p. 426, distinguished. *Ghulam Khan* v *Muhammad Hassan*, I. L. R., 20 Calc., 167, followed.

Bihari Lal *v* Chunni Lal, I. L. R., 20 All. 457

——— SECTION 522—*Arbitration — Award—Decree on award made without allowing time to file objections—Appeal.*] An appeal will lie from a decree passed in accordance with an award if such decree has been passed without allowing to the parties the time prescribed by law for filing objections to the award. *Ibrahim Ali* v *Mohsin Ali*, I. L. R., 18 All., 422, and *Maharajah Jotendro Sing Singh Bahadur* v *Mohun Ram Marwaree*, 23 W. R., 429, followed.

Najm-ud-din Ahmad *v.* Peech, I. L. R., 20 All ... 684

——— SECTION 539—*Legal ability of persons—Suit brought by the whole body of persons legally authorized to administer the trust.*] *Held* that section 539 of the Code of Civil Procedure does not apply to a case where the suit is instituted by the whole body of persons who are legally authorized to administer the trust to which it relates. *Rai Budree Das Mukim Bahadur* v. *Chuni Lal Johurry*, 10 C. W. N., 581, followed.

Ram Das *v.* Badri Narain, I. L. R., 20 All. 27

——— SECTION 562—*Remand—Appeal from order of remand after decision of the suit on merits thereof.*] *Held* that no appeal will lie from an order of remand passed under section 562 of the Code of Civil Procedure if such appeal is filed after the suit has in compliance with the order of remand been decided and no appeal is preferred from the decree in the suit. *Madhusudan Sen* v. *Kamini Kanta Sen*, 9 C. W. N., 895, followed. *Rameswar Singh* v. *Sheodin Singh*, I. L. R., 12 All., 510, distinguished.

Salig Ram *v.* Brij Bilas, I. L. R., 20 All. 859

——— SECTION 566—*Remand—Return to remand to be made by the Court originally seized of the case—Jurisdiction.*] *Held* that when issues are remitted for trial under section 566 of the Code of Civil Procedure such issues are triable only by the Court which was originally seized of the case. The principle of *Sabri* v. *Ganoshi*, I. L. R., 14 All., 23, followed.

Ali Sher Khan *v.* Ahmad-ullah Khan, I. L. R., 20 All. ... 660

——— SECTION 578—*Irregularity in [illegible] of a suit on a Sunday.*] *Held* that the dismissal of a suit on a Sunday is a mere irregularity which is covered by the provisions of section 578 of the Code of Civil Procedure. *Ram Dat Chaubey*, [illegible]

v. *The Official Liquidator, Cotton Ginning Company, Limited, Cawnpore*, I. L. R., 9 All., 366, and *Unnoo Ram Chatterjee* v. *Protab Chunder Shiromonee*, 16 W. R. C. R., 230, referred to.

Sheo Ram Tiwari v. Thakur Prasad, I. L. R., 29 All. ... 562

CIVIL PROCEDURE CODE, SECTION 583—*Execution of decree—Restitution of property sold in execution of a decree afterwards reversed in appeal—Procedure.*] In a suit for a declaration that certain property belonged to the defendant judgment-debtor the plaintiff decree-holder obtained a decree and proceeded on the strength thereof to sell the property. In appeal, however, this decree was reversed. The rightful owner of the property sold then applied to the Court for restitution of the property. *Held* that whether the application could or could not be considered as one falling strictly within the terms of section 583 of the Code of Civil Procedure, the applicant was entitled to restitution. *Radha Singh* v. *Mangnu Ram*, 6 C. W. N., 710, referred to.

Shiam Sundar Lal v. Kaisar Zamani Begam, I. L. R., 29 All. 143

——— SECTIONS 622, 623, 626 AND 629—*Review of judgment—Application for review rejected—Revision—Small Cause Court suit.*] An application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency in the court fee paid upon the application. *Held* that this order was open to revision. *Ram Lal* v. *Ratan Lal*, I. L. R., 26 All., 672, distinguished.

Willis v. Jawad Hussain, I. L. R., 29 All. 408

COMMISSION to make partition, *See* Civil Procedure Code, section 396 ... 335

COMPLAINT, *See* Criminal Procedure Code, section 203 7

——— Frivolous or vexatious ———, *See* Criminal Procedure Code, section 250 137

COMPROMISE, *See* Act No. XV of 1877, schedule II, articles 61 and 83 627

COMPROMISE, *See* Hindu Law 451

——— ——— *See* Hindu Law 487

CONFESSION, *See* Act No. I of 1872, section 30 434

CONSTRUCTION OF DOCUMENT, *See* Contract 181

See Hindu law 217

——— *See* Landholder and tenant ... 203

CONSTRUCTION OF STATUTES, *See* Act (Local) No. I of 1891, sections 34, 40 and 41 376

CONTEMPT OF COURT, *See* Advocate 95

"CONTENTIOUS" SUIT, *See* Lis pendens 339

CONTRACT—*Railway Company—Receipt of goods by one company for carriage over its own and another Company's line—Liability in respect of carriage made by delivering Company—By-laws—Power of Railway Company to alter the principle of calculation of rates.*] Two wagon loads of chillies were received by the Station Master at Beawar on the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsula Railway at a rate of Rs. 270 per wagon for the whole distance. On arrival at Agra the Great Indian Peninsula Railway Company's Station Master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees

psid under protest and sued both Railway Companies for a refund of the excess charges.

Held that the contract for carriage of the goods for the whole distance was one entire contract with the receiving company, who were liable for the overcharge, if any, wrongfully demanded from the consignees. *Muschamp* v. *Lancaster and Preston Junction Railway Company*, 8 M. and W., 421; 58 R. R., 758, *Webber* v. *The Great Western Railway Company*, 3 H. and C., 771, and *Kate Ram Mangray* v. *The Madras Railway Company*, I. L. R., 3 Mad., 240, followed.

Held also that a bye-law of the Great Indian Peninsula Railway Company which reserved to the Railway the right of remeasurement, reweighment, reclassification and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or under-charged did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge at the place of destination mound rates instead of wagon rates.

Chunni Lal v. The Nizam's Guaranteed State Railway Company, Ld., I. L. R., 29 All. 228

CONTRACT, *Marriage settlement—Construction of document—Agreement to pay annuity to bride*] On the occasion of the marriage of the plaintiff, then a minor, with the son of the defendant, the defendant agreed with the father of the plaintiff to pay to the plaintiff unconditionally the sum of Rs. 500 a month from the date of the marriage, and the payment of this allowance was made a charge upon certain immoveable property specified in the agreement The plaintiff after a time refused, for reasons stated by her in her plaint, to live with her husband Subsequently to this the stipulated allowance having been stopped, the plaintiff sued on the agreement above referred to to recover arrears amounting to Rs. 15,000.

Held that the plaintiff, though not a party to the agreement in question, was entitled to sue on it; also on a construction of the agreement, that, no conditions as to the conduct of the plaintiff being laid down therein the fact that the plaintiff refused to live with her husband was no bar to the suit.

Husaini Begam v. Khwaja Muhammad Khan, I. L. R., 29 All. 151

——— *See* Act (Local) No. I of 1900, section 47 ... 346

——— *See* Guardian and minor 213

CO-SHARER, *See* Act (Local) No II of 1901, section 201 ... 158

COURT FEE, *See* Act No. VII of 1870, section 7, V(*b*) and (*d*) and section 28 382

——— *See* Act No. VII of 1870, sections 9, 10, 11 and 28 ... 749

——— *See* Act No. VII of 1870, section 17 165

——— *See* Civil Procedure Code, section 411 537

COURT OF WARDS, *See* Act No. XIX of 1873, sections 194*(g)* and 203 589

CRIMINAL BREACH OF TRUST, *See* Act No. XLV of 1860, sections 62 and 406... 25

CRIMINAL PROCEDURE CODE, SECTIONS 59 AND 60, *See* Act No. XLV OF 1860, section 225 575

——— SECTION 203—*Complaint—Jurisdiction—Dismissal of complaint no bar to the cognizance of a fresh*

complaint in pari materiâ.] There is nothing to prevent a Magistrate from entertaining a second complaint made against the same person even though the second complaint may be connected with a previous complaint which has already been dismissed under the provisions of section 203 of the Code of Criminal Procedure. *Queen-Empress* v *Umedan*, Weekly Notes, 1895, p. 86, followed. *Dwarka Nath Mondul* v *Bam Maddab Banerji*, I. L. R., 28 Calc., 662, and *Mir Ahmad Hossain* v *Mahomed Askari*, I. L. R., 29 Calc., 726, referred to. *Queen-Empress* v. *Adam Khan*, I. L. R., 22 All., 106, distinguished

Emperor *v.* Mehrban Husain, I. L. R., 29 All. 7

CRIMINAL PROCEDURE CODE, SECTION 54, *See* Act No. XLV of 1860, section 223 377

———————————, SECTION 250—*Frivolous complaint—Jurisdiction—Complaint dismissed without issue of process.*] *Held* that section 250 of the Code of Criminal Procedure is not applicable to a case in which a complaint is dismissed without any process being issued for the attendance of the person against whom such complaint is made.

Bhagwan Singh *v.* Harmukh, I. L. R., 29 All. 137

———————————, SECTION 339—*Pardon—Pardon granted after accused has had an opportunity of cross-examining the witnesses for the prosecution—Withdrawal of pardon and subsequent commitment.*] Where a pardon was tendered by a Magistrate to an accused person after he had had an opportunity accused person of cross-examining the witnesses for the prosecution, and on its appearing that he had not made a full and true disclosure of the facts of the case such pardon was withdrawn and he was committed along with his co-accused to the Court of Session. *Held* that the commitment was not open to objection. *Queen-Empress* v. *Brij Narain Man*, I. L. R., 20 All., 520, followed.

Emperor *v.* Budhan, I. L. R., 29 All. 24

———————————, SECTION 435—*Revision—Executive order—Order of District Magistrate dismissing a headman.*] *Held* that an order passed by a District Magistrate under the rules framed by Government under section 45(3) of the Code of Criminal Procedure is an executive order and not subject to the revisional powers of the High Court.

In the matter of the petition of Dumma, I. L. R., 29 All.... 663

CUSTOM, *See* Hindu Law 405

———————, *See* Hindu law 100

———————, *See* Pre-emption 295

DECREE, Form of——, *See* Act No. IV of 1882, sections 92 and 93 ... 481

DECREE EX PARTE—*Civil Procedure Code, section* 108—*Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—Limitation.*] A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August 1900 and made absolute on the 21st December 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March 1902. Subsequently a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November 1904. As against this defendant the decree was made absolute on the 27th of November 1905.

Held that the orders of the 25th August 1900 and the 16th November 1904, between them, operated as one decree for the

sale of the mortgaged property; that the joint effect of the orders of the 21st December 1901 and the 27th November 1903 was to make absolute this decree, and that an application for execution made on the 21st December 1905 was not barred by limitation. *Bhura Mal* v. *Bar Kat in Das*, I. L. R., 25 All., 583, *Nam Sundar* v. *Muhammad Ishtiaq Ali*, I. L. R., 27 All., 501, and *Shaida Husain* v. *Hub Husain*, Weekly Notes, 1902, p 184, referred to.

Ganu Sahai v. Ashfak Husain, I. L. R., 29 All. ... 623

DECREE EX PARTE, *See* Civil Procedure Code, section 108 ... 574

DEFAMATION, *See* Act No. XLV of 1860, section 499 685

DEFINITION, *See* Act No. XLV of 1860, section 153 560

——— *See* Act No. XLV of 1860, section 192 357

——— *See* Act No XLV of 1860, section 225 575

——— *See* Act No. XLV of 1860, sections 280 and 420 ... 141

——— *See* Act No. XLV of 1860, sections 425, 420 565

——— "undivided family," *See* Act No. IV of 1833, section 4 ... 308

DEPOSIT, *See* Act No. XV of 1877, sections 19 and 20; schedule II, articles 59 and 60 773

EASEMENT—*Right to unobstructed view of shop*] *Held* that no action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers by formerly had of the shop. *Smith* v. *Owen*, 35 L. J., Ch., 317, and *Butt* v. *Imperial Gas Company*, L. R., 2 Ch., 158, followed.

Gopi Nath v. Munno, I. L. R., 29 All 92

——— *Right of privacy—Defendant not allowed to give himself increased facilities for civil wrong to plaintiff's annoyance*] *Held* that the fact that the plaintiffs' zenana house might be to some extent overlooked by persons standing on the roof of the defendants' house was no justification for the defendants opening fresh doors or windows in the wall of their upper storey looking towards the plaintiffs' house, whereby the plaintiffs' house might be overlooked without the person inspecting it being visible to the occupants of that house. *Gokal Prasad* v. *Radho*, I. L. R., 10 All., 353, referred to.

Abdul Rahman v. Bhagwan Das, I. L. R., 29 All. ... 582

——— *See* Act No V of 1882, section 4 84

——— *See* Act No. V of 1882, sections 15 and 28(c) ... 571

ESCHEAT, *See* Regulation No. V of 1799, section 7 277

ESTOPPEL, *See* Civil Procedure Code, section 13 549

——— *See* Civil Procedure Code, sections 311, 312 and 313 ... 612

EVIDENCE, *See* Act No. I of 1872, section 30 434

——— *See* Act No. XV of 1877, section 7 29

——— *See* Civil Procedure Code, section 13 549

——— *See* Will 82

EXECUTION OF DECREE—*Sale in execution—Purchase of share in property to some extent unencumbered—Presumption Civil Procedure Code, section 318—Act No XV of 1877 (Indian Limitation Act), schedule II, article 138 Suit for possession*] Where in execution of a simple money decree an undivided share in immovable property, part of which was subject to mortgages, was sold, it was *held* that in the absence of specific indications to the contrary it must be presumed that the share sold was, as far as might be, the share which was not incumbered.

Held also that the fact that an application under section 318 of the Code of Civil Procedure made by an auction-purchaser has been rejected as made beyond time is no bar to a suit for possession of the property purchased. *Sew Mokan Rama* v *Bhagoban Das Pandey*, I. L. R., 9 Calc., 602, and *Kishori Mohan Roy Chowdhry* v *Chunder Nath Pal*, I. L. R., 14 Calc., 644, followed.

Sheo Narain v. Nur Muhammad, I. L. R., 29 All. ... 468

EXECUTION OF DECREE *Material irregularity in conduct of sale —No proof of substantial injury—Postponement of sale—Order staying sale withdrawn and sale held without issue of fresh proclamation—Civil Procedure Code, sections* 290, 291, 244 *and* 311, 312] A proclamation of sale in execution of a decree fixed the sale for 20th February 1897. By an order of the Subordinate Judge of Gorakhpur, made *ex parte* on 11th February, the sale was stayed, and on 16th the Collector acting on that order, struck the proceedings off the pending file. On 22nd February in consequence of notice received from the Subordinate Judge that the order staying the sale had been set aside, the sale was brought on in continuation of the sales listed for the 20th, which had not been finished, and on the 23rd, the property of the judgment-debtors was sold to the decree-holder who had obtained leave to bid. On application for confirmation of the sale the judgment-debtors applied under section 311 of the Civil Procedure Code to have the sale set aside; but the Subordinate Judge confirmed the sale, finding that, although there were irregularities in the conduct of the sale, the judgment-debtors had not sustained any damage and that decision was upheld by the High Court. In a suit to have the sale annulled on the grounds stated in the application under section 311, one of which was that the sale was illegal without the issue of a fresh proclamation of sale *Held* by the Judicial Committee that the suit was not maintainable. Assuming that a fresh proclamation should have been issued, the omission was an irregularity which had involved no loss to the judgment-debtors, whose only course was to object, as they did, to the confirmation of the sale, which they could not afterwards impeach by regular suit.

Gajrajmati Toorain v. Akbar Hussain, I. L. R., 29 All. ... 196

——— *See* Act No. XV of 1877, section 7 schedule II, articles 178, 179 279

——— schedule II, article 179 301

——— *See* Act No. IV of 1882, sections 88 and 90 12

——— *See* Civil Procedure Code, sections 244 and 318 207

——— *See* Civil Procedure Code, sections 244 and 583 348

——— *See* Civil Procedure Code, sections 310A and 244(c) 275

——— *See* Civil Procedure Code, sections 311, 312 and 313 612

See Civil Procedure Code, section 316 ... 591

See Civil Procedure Code, sections 320 and 325A 415

See Civil Procedure Code, section 583 ... 148

See 628

FALSE CHARGE, *See* Act No. XLV ... section 211 587

FALSE EVIDENCE, *See* Act No. XLV ... 60, section 192 ... 361

FALSE IMPRISONMENT—*Suit for damages—Cause of action—Defendant not the actual prosecutor—Suit not maintainable.*] *A* having been badly beaten was carried to a police station, where he named *X* and others as the persons who had attacked him. The police, after making the usual [illegible] arrested the persons named by *A* and sent them before a Magistrate who committed them all to the Court of Session. The result of the trial was that the accused were all acquitted. *Held* that no suit for damages for false imprisonment would under these circumstances lie against *A*. *Narasinga Row* v. *Muthaya Pillai*, I. L. R., 26 Mad., 362, followed

Balbhaddar Pande v. Basdeo Pande, I. L. R., 29 All. ... 44

FORECLOSURE, *See* Bengal Regulation No. XVII of 1806, section 8 145

——————. Suit for—, *See* Act No. IV of 1882, sections 25, 86 and 87 76

FRAUD, *See* Suit to set aside decree on the ground of fraud ... 418

GOSHAIN, *See* Hindu law 109

GRIEVOUS HURT, *See* Act No. XLV of 1860, sections 304 and 335 ... 282

GUARDIAN AD LITEM, *See* Civil Procedure Code, section 443 ... 290

——————. *See* Civil Procedure Code, section 444 ... 675

——————. *See* Civil Procedure Code, section 457 ... 728

GUARDIAN AND MINOR, *Contract—Specific performance—Specific performance of contract not favourable to minor, refused*—The certificated guardian of a minor, finding that it was necessary that some of the minor's property should be sold, applied for permission to the District Judge, who sanctioned the sale for a price of Rs. 725. Subsequently the guardian discovered that this was an inadequate price, and having received an offer of Rs. 825 for the property, went again to the District Judge for sanction to the second contract, obtained sanction and sold the property for Rs. 825. *Held* that the former contract being to the detriment of the minor could not be specifically enforced.

Chhitar Mal v. Jagan Nath Prasad, I. L. R., 29 All. ... 213

——————. *See* Act No. VIII of 1890, section 10 ... 10

——————. *See* Act No. VIII of 1890, section 10 ... 210

——————. *See* Act No. VIII of 1890, section 52 ... 672

HIGH COURT. Disciplinary powers of——, *See* Advocate ... 98

HINDU LAW—*Adoption—Adoption during wife's pregnancy*] *Held* that the fact that at the time of making an adoption the wife of the adopting father is pregnant does not affect the validity of the adoption *Nagabhushanam* v. *Sriramamurti*, I. L. R., 3 Mad., 180, and *Hanmant Ramchandra* v. *Bhimacharyu*, I. L. R., 12 Bom., 105, followed. *Narayana Reddi* v. *Vardachala Reddi*, M. S. D., 1853, 97, dissented from.

Daulat Ram v. Ram Lal, I. L. R., 29 All. 340

——————. *Alienation by widow—Legal necessity—Order for interest or decree in execution where decree did not allow interest—Sum for interest made part of consideration for sale deed—Res judicata—Decision in suit for pre-emption—Civil Procedure Code, section* 13.] A Hindu widow in possession of her husband's immoveable property for a widow's estate executed, on 22nd December 1885, a deed of sale of it in favour of a creditor of her husband under a decree, dated 12th July 1861. No future interest was allowed by that decree, but on 22nd October 1866 the decree-holder in execution of it obtained from the Court of the Deputy Commissioner an order

for interest on the decree, which order was, however, set aside by the Judicial Commissioner on 15th September 1869 on the ground that a Court executing a decree had no power to alter or add to it. The consideration for the deed of sale, which was executed whilst the order granting interest was in force, was made up of Rs. 7,080, the amount her husband was liable for under the decree, Rs. 5,638 for interest on the decree, and a sum of Rs. 7,280 in cash. On 23rd December 1869 the plaintiff as reversionary heir of the husband brought a suit against the vendee for pre-emption, but that suit was dismissed on the ground that his right of pre-emption was not established. The widow died in 1894, and in 1899 the plaintiff brought the present suit for possession of the property and for mesne profits from her death. The defendants were the Deputy Commissioner as representing the Court of Wards, into whose charge the vendee's estate had come, and the purchaser from the Court of Wards of the greater portion of the property in suit. The defence was that the alienation was made for legal necessity, and that the suit was barred by the decision in the pre-emption suit, which operated as *res judicata*. Both Courts below found on the facts that the item of Rs. 7,080 was justified by legal necessity, and that the advance of the sum in cash as part of the consideration was not proved.

Held by the Judicial Committee that the defendants, claiming as they did under the vendee, and standing, therefore, in no higher position than his, were not entitled to base a claim to the property upon an order made in the vendee's favour, but subsequently set aside: under the circumstances the doctrine of legal necessity could not be extended to the item for interest. There should be a decree for possession and for the balance of mesne profits after deducting the Rs. 7,080 for which the property was liable.

Held also that all that was in issue in the former suit was the right of pre-emption as to the widow's interest only in the property, and that the effect of the deed of sale on the reversion could not properly have been made a ground of attack in that suit: the present suit was therefore not barred by section 13 of the Civil Procedure Code.

Deputy Commissioner of Kheri *v.* Khanjan Singh, I. L. R., 20 All. 331

HINDU LAW—*Change of religion—Effect of conversion of a member of a joint Hindu family to Muhammadanism—Regulation No. VII of 1832, s. 9—Compromise—Effect of compromise entered into by a Hindu female with a limited estate.*] *Held* that Regulation No. VII of 1832 did not abrogate the Hindu law as to the consequences of apostacy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce these consequences. Where, therefore, in a joint Hindu family consisting of a father and one son the father was converted to Muhammadanism in the year 1845, the immediate effect of such conversion was to make the son sole owner of the property which up to that time had belonged jointly to him and his father.

Held also that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of her deceased husband or father, is not binding on the reversioners, even though it has been followed by a decree of Court, nor is a decree on an arbitration award, one of the parties to the submission having been a Hindu widow, or daughter; but the reversioners can only be bound by a decree made after full contest in a *bond fide* litigation.

Imrit Koonwar v. *Roop Narain Singh*, 6 C. L. R., 76, *Sheo Narain Singh* v. *Khurga Koerry*, 10 C. L. R., 387; *Jeram Laljee* v. *Veerbai*, 5 Bom., L. R., 895, *Sant Kumar* v. *Deo Saran*, I. L. R., 8 All.,

365, *Ram Sarup* v *Ram Dei*, Weekly Notes, 1907, p. 38, and *Stapilton* v. *Stapilton*, 1 White and Tudor, 230, referred to.

Gobind Krishna Narain v. Khunni Lal, I. L. R., 29 All. ... 487

HINDU LAW—*Grihast Goshains — Succession—Custom—Adoption of chela by widow of deceased Goshain.*] The plaintiff set up a custom as prevalent amongst the Grihast Goshains of Hardwar and other places adjacent in the United Provinces whereby the widow of a deceased Goshain was entitled with the concurrence of the elders of the sect to adopt a chela and successor to her deceased husband. *Held* on the evidence that such custom was not established. *Ramalakshmi Ammal* v *Sivananthe Perumal Sethurayar*, 14 Moo., I. A., 570, *Khuggender Narain Chowdhry* v. *Sheruppur Oghoreenth*, I. L. R., 4 Calc., 643, and *Goenel Does* v. *Ramchoy Jemadar*, 1 Fulton, 217, referred to.

Semble that the sect of Grihast Goshains living mostly in those provinces at Hardwar, Dehra Dun and other adjacent places, are subject generally to the ordinary rules of Hindu law. *Collector of Dacca* v. *Jagat Chunder Goswami*, I. L. R., 28 Calc., 608, referred to.

Chhajju Gir v. Diwan, I. L. R., 30 All. 109

———*Hindu widow—Effect of relinquishment of the estate by a widow in favour of the present reversioners.*] A Hindu widow in possession of a widow's estate in property of her deceased husband, a separated and childless Hindu, relinquished possession thereof to two persons who at the time were the next reversioners, they agreeing to pay her a maintenance allowance; but it did not appear that she intended to make them, if she could, full owners of the property, although certain incorrect recitals in the agreement entered into by the widow, when she gave possession of the property, might have lent colour to this suggestion. Both the persons thus put into possession predeceased the widow. *Held* that the nearest reversionary heir to the widow's late husband was entitled to succeed on the death of the widow.

Quære whether in these provinces a Hindu widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate? *Behari Lal* v. *Madho Lal Ahir Gayawal*, I. L. R., 19 Calc., 236, and *Ramphal Koi* v. *Tula Kuars*, I. L. R., 6 All., 116, referred to.

Raj Kishore v. Durga Charan Lal, I. L. R., 29 All. ... 71

———*Jains — Adoption — Custom — Authority of widow to adopt — Adoption of married man.*] *Held* that according to the law and custom prevailing amongst the Jain community (1) a widow has power to adopt a son to her deceased husband without special authority to that effect, and (2) a married man may lawfully be adopted.

Maharaja Gobind Nath Ray v. *Gulab Chand*, 5 S. D. A., 270, *Shee Singh Rai* v. *Dukhi*, I. L. R., 1 All., 688, *Lalchmi Chand* v. *Gatto Bai*, I. L. R., 8 All., 349, *Bhagwan Singh* v *Bhagwan Singh*, I. L. R., 17 All., 294, and 21 All., 419, *Raja Venkatrao Anandram Nimbalkar* v. *Jyavantrao*, 4 Bom., H. C. Rep., A. C. J., 191, *Nathaji Krishnaji* v. *Hari Jagoji*, 8 Bom., H. C. Rep., A. C. J., 67, *Sadashiv Moreshwar Ghate* v. *Hari Moreshwar Ghate*, 11 Bom., H. C. Rep., 190, *Lakshmappa* v. *Ramava*, 12 Bom., H. C. Rep., 356, and *Dharma Dagu* v. *Rambrishna Chimnaji*, I. L. R., 10 Bom., 80, referred to.

Manohar Lal v. Benarsi Das, I. L. R., 29 All. ... 495

———*Joint Hindu family—Ancestral family business—Liability of member of the family after severance of his connection with*

the family business.] A member of a joint Hindu family carrying on an ancestral family business upon attaining the age of majority completely severed his connection with the family business, nor was it shown that he ever ratified any of the transactions entered into by the family firm. *Held* that such member could on the failure of the family business only be made liable for its debts to the extent of his interest in the joint family property. He could not be held personally liable.

Bishambhar Nath *v.* Sheo Narain, I. L. R., 29 All. ... 166

HINDU LAW—*Joint Hindu family—Family business—Liability of minor member of family for trade debts—Separate property.*] Where a member of a joint Hindu family carrying on an ancestral family business upon attaining majority separates entirely from the family and the family business and thereafter acquires separate property such separate property cannot be made liable for the debts incurred by the family trading firm, but the interest of the separating member in the family property will alone be liable. *Chalamayya v. Varadayya*, I. L. R., 22 Mad., 167, followed. *Ram Lal Thakuredas v. Lakhmichand Munuram*, 1 Bom., H. C. Rep., App. B, *Jokurra Bibee v. Syngopal Misser*, I. L. R., 1 Calc., 470, *Bemola Dossee v. Mohun Dossee*, I. L. R., 6 Calc., 732, and *Lutchmanan Chetty v. Siva Prokasa Mudelvar*, I. L. R., 26 Calc., 340, referred to. *Samalbhai Nathubhai v. Someshwar*, I. L. R., 5 Bom., 33, and *In the matter of Haroon Mahomed*, I. L. R., 14 Bom., 189, distinguished.

Bishambhar Nath *v.* Fatch Lal, I. L. R., 29 All. ... 176

———*Joint Hindu family—Family business—Suit to recover a debt due to the firm—Parties to such suit.*] *Held* that the managing members of a joint Hindu family carrying on a joint family business are not entitled to maintain a suit in their own names against debtors of the family without joining with them in the suit either as plaintiffs or defendants all the other members of the family. *K. P. Kanna Pisharody v. V. M. Narayana Somayajipad*, I. L. R., 3 Mad., 234, *Balkrishna Moreshwar Kunte v. The Municipality of Mahad*, I. L. R., 10 Bom., 32, *Rameshuk v. Ramlali Koondoo*, I. L. R., 6 Calc., 815, *Kalidas Kevaldas v. Nathu Bhagwan*, I. L. R., 7 Bom., 217, *Imam ud din v. Jaladhar*, I. L. R., 14 All., 524, *Alagappa Chetti v. Vellian Chetti*, I. L. R., 18 Mad., 33, and *Angamuthu Pillai v. Kolandavelu Pillai*, I. L. R., 23 Mad., 190, referred to. *Pateshri Partap Narain Singh v. Rudra Narain Singh*, I. L. R., 26 All., 628, distinguished.

Shamrathi Singh *v.* Kishan Prasad, I. L. R., 29 All. ... 211

———*Joint Hindu family—Liability of sons in respect of a mortgage executed by the father—Exemption of son's interest—Subsequent suit against sons for share of debt payable by them—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles* 147, 132, 120.] Certain joint ancestral property was mortgaged by the head of the family first in 1882 and again in 1893. Subsequently the second mortgagee redeemed the first mortgage. The second mortgagee then sued to recover the amount due on both mortgages by sale of the mortgaged property, and obtained a decree in March 1895 and an order absolute for sale on the 26th of October 1897. To this suit the sons and grandsons of the mortgagor were not made parties. The sons and grandsons of the mortgagor sued for and obtained a decree exempting their interest in the mortgaged property from the operation of the mortgagee's decree. The mortgagee then sued the sons and grandsons to recover from them a proportionate part of the amounts due on his mortgages. This suit was instituted on the 6th of April 1904.

Held that the mortgagee's suit against the sons and grandsons of the mortgagor was maintainable, and that it was not barred by limitation, the rule applicable being either article 147 or article 132 of the second schedule to the Indian Limitation Act, 1877.

Badri Prasad v. *Madan Lal*, I. L. R., 15 All., 75, *Maharaj Singh* v. *Balwant Singh*, I. L. R., 28 All., 508, and *Muhammad Askari* v. *Radhe Ram Singh*, I. L. R., 22 All., 397, distinguished. *Bhuwan Singh* v. *Angan Lal*, I. L. R., 21 All., 301, and *Arishnabra* v. *Dora Sami*, I. L. R., 11 Mad., 413, followed.

Ram Singh v. Sobha Ram, I. L. R., 29 All. 544

HINDU LAW—*Joint Hindu family—Minor—Right of minor member of a joint family to sue for partition.*] *Held* that a minor member of a joint Hindu family may institute a suit for and obtain partition of his share in the joint family property if there exist circumstances such as in the interest of the minor render it advisable that his share should be set aside and secured for him.

Bhola Nath v. Ghasi Ram, I. L. R., 29 All. 373

——— *Joint Hindu Family—Partition—Partition deed giving certain advantages to minor member of family—Right of person so benefited to sue on deed—Act No. I of 1877 (Specific Relief Act), section 23(c).*] By a deed of partition executed by the adult members of a joint Hindu family it was agreed that a certain minor member of the family, represented in the execution of the deed by his father, should receive a certain share in a particular village "by right of primogeniture," and the agreement further recited that the member in question had been put into possession of the share allotted to him. It was further agreed that, inasmuch as the property thus dealt with was subject to two mortgages, the other members of the family would be responsible for the payment of the mortgage debts and would indemnify the recipient of the mortgaged property in case of proceedings being taken against such property for satisfaction of the mortgage debts.

Held, on suit by the minor (after attaining majority) to compel reimbursement by the other members of the family, that the partition deed was enforceable in favour of the plaintiff, just as much as, if just and equitable, it would have been binding upon him, and that the plaintiff was entitled to sue for any benefit which the deed purported to secure to him. *Annamali Chetty* v. *Murugasa Chetty*, L. R., 30 I. A., 226, and *Gandy* v. *Gandy*, L. R., 30 Ch. D., 57, referred to.

Held also, on a construction of the partition deed that the plaintiff was also entitled to sue having regard to the terms of section 23(c) of the Specific Relief Act, 1877.

Awadh Sarju Prasad Singh v. Sita Ram Singh, I. L. R., 29 All. ... 37

——— *Joint Hindu family—Partition—Effect of partition of family property between two branches of the family without specification of individual shares of one branch.*] By an award the property of a joint Hindu family consisting of an uncle and two nephews was partitioned, one share being allotted to the uncle and one to the nephews, but nothing was said as to the shares to be taken by the nephews individually, nor did they express any desire to separate. *Held* that the presumption was that the shares of the nephews still continued to be joint property so far as they were concerned. *Balkishan Das* v. *Ram Narain Sahu*, I. L. R., 30 Calc., 738, distinguished.

Durga Dei v. Balmakund, I. L. R., 29 All. 93

HINDU LAW—*Joint family — Presumption and onus of proof as to whether property is ancestral or self-acquired—Nucleus of ancestral property—Property purchased while living jointly—Will disposing of ancestral property—Invalidity of.*] A Hindu, the head of a joint family governed by the Mitakshara law, left property which on his death in 1849 passed to his three sons, who remained joint until 1866 when they came to a partition amongst themselves. There was nothing to show that any of them then had any separate property. At that time one of them had two sons and another son was born to him after the partition The father and these three sons lived together jointly and acquired other property. The father died in 1874 leaving a will by which he gave a small allowance and a residence to each of his younger sons, and left all the rest of his property to his eldest son describing it as his self-acquired property In a suit brought by the two younger sons against their brother to set aside the will, the validity of which depended on the question whether the property was ancestral or self-acquired, the Judicial Committee (reversing the decision of the High Court) held that the share taken on partition by the father of the plaintiffs and defendant was ancestral property in which from their birth his sons acquired an interest; that there thus being a nucleus of ancestral property the onus was on the defendant to show that the property in suit was self-acquired and not purchased with ancestral funds; that such onus had not been discharged; that on the contrary the evidence showed that there was a common stock of the whole family into which each member voluntarily threw what he might otherwise have claimed as self-acquired and that the property purchased by, or with the assistance of, the joint funds was joint property, and did not belong to any particular member of the family. There was therefore no self-acquired property, and the will was consequently inoperative to defeat the claim of the younger sons to a share in the family estate.

Lal Bahadur *v.* Kanhaiya Lal, I. L. R., 20 All. 244

———*Joint Hindu family—Redemption of mortgage—Suit by father dismissed—Subsequent suit by sons.*] A joint Hindu family, consisting of father and sons, were co-mortgagors by way of usufructuary mortgage of joint family property. The father sued for redemption, but was unsuccessful. *Held* on suit by the sons claiming to redeem the whole mortgage, that the sons were not precluded by reason of the result of their father's suit from suing to redeem, but they could not obtain redemption of more than their own shares.

Sundar Lal *v.* Chhitar Mal, I. L. R., 20 All. 215

———*Joint Hindu family—Self acquired property—Devise of self-acquired property to sons—Nature of sons' interest.*] *Semble* that property which is the self-acquired property of a Hindu who has sons and grandsons and is devised by will to one of the owner's sons remains after devolution self-acquired property and does not become the joint property of the devisee and his sons. *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy*, I. L. R., 10 Bom., 528, followed. *Tara Chand* v. *Reeb Ram*, 3 Mad. R. C. Rep., 60, and *Muddun Gopal Thakoor* v. *Ram Baksh Pandey*, 6 W. R., C. R., 71, dissented from.

Semble also that, where the sons of a Hindu father, apparently members with their father of a joint Hindu family, took under their father's will property acquired by him under the will of his father, devised to them separately by name, but continued to live in the manner of a joint Hindu family and treated at all events the immovable property for a series of years in all respects as if

it were joint ancestral property, the property so devised remained separate property according to Hindu law. *Appovier* v. *Rama Subba Aiyan*, 11 Moo., I. A. 75 and *Balkishen Das* v. *Ram Narain Sahu* L. R., 30 I. A., 139, referred to.

Parsotam Rao Tantia v. Janki Rai 354

HINDU LAW—*Mitakshara—Joint Hindu family—Ancestral property—Property inherited from maternal grandfather*] *Held* that a son in a joint Hindu family does not acquire by birth an interest jointly with his father in property which the latter inherits from his maternal grandfather. *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar*, I. L. R., 27 Mad., 382, dissented from. *Sudarsanam Maistri* v. *Narasimha Maistri*, I. L. R., 25 Mad., 140, discussed. *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*, I. L. R., 25 Mad., 678, *Karuppai Nachiar* v. *Shankaranarayanan Chetty*, I. L. R., 27 Mad., 300, and *Chaiturbhooj Meghji* v. *Dharamsi Naramji*, I. L. R., 9 Bom., 488, referred to.

Jamna Prasad v. Ram Partap, I. L. R., 29 All. ... 667

———— *Mitakshara—Will—Construction of document—Property devised to wife as "malik"—Estate taken by widow.*] Where a Hindu governed by the Mitakshara law devised immovable property to his wife stating that she would be the "malik" of the property after his death, it was *held* that the word "malik" imported an absolute proprietary interest, and that, in the absence of any indication of a contrary intention on the part of the testator, the widow took an absolute, and not merely a life estate in the property so devised. *Surajmani* v. *Rabi Nath*, I. L. R., 25 All., 351, dissented from. *Jamna Das* v. *Ramautar Pande*, I. L. R., 27 All., 364, distinguished. *Lala Ramjeean Lal* v. *Dal Koer*, I. L. R., 24 Calc., 406, *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*, I. L. R., 24 Calc., 824, and *Raj Narain Bhadury* v. *Asutosh Chackerbutty*, I. L. R., 27 Calc., 44 and 649, followed.

Padam Lal v. Tek Singh, I. L. R., 29 All. 217

———— *Religious endowment—Right to appoint manager.*] According to Hindu law, when a religious endowment has been founded, the right to appoint a manager or superintendent remains in the founder and his descendants, unless there is evidence to show that the founder or his descendants have made any inconsistent disposition. *Gosamee Sree Greedharjeejee* v. *Rumanlaljee Gosamee*, L. R., 16 I. A., 137, *Sheoratan Kunwari* v. *Ram Furgash*, I. L. R., 18 All., 227, and *Mussumat Jai Bansi Kunwar* v. *Chattar Dhari Singh*, 5 B. L. R., 131, followed.

Sheo Prasad v. Aya Ram, I. L. R., 29 All. 663

———— *Succession—Effect of a wife deserting her husband and becoming a prostitute.*] *Held* that the fact of a Hindu woman having deserted her husband and become a prostitute did not have the result of entirely severing all connection between herself and her husband. The husband therefore might still be heir to property acquired by the wife since she left him. *Subbaraya Pillai* v. *Ramasami Pillai*, I. L. R., 28 Mad., 171, and *Bishashar* v. *Mata Ghulam* N.-W. P., H. C. Rep., 1870, p. 300, followed. *Mussamat Ganga Jati* v. *Ghasita*, I. L. R., 1 All., 46, referred to. *Tara Munnee Dassee* v. *Motee Bunsaree*, 7 Sel., Rep., 278, and *In the goods of Kaminey Money Bewah*, I. L. R., 21 Calc., 697, dissented from.

Narain Das v. Tirlok Tiwari, I. L. R., 29 All. ... 4

———— *Title acquired under will of deceased wife—Property devised subject to mortgages—Compromise of claims of reversioners to estate of wife's father—Nature of devisee's title not thereby*

altered] One Munni Lal died leaving certain property, of which his widow Jasoda Kunwar took possession. Jasoda Kunwar died leaving the property by her will to her daughter Anpurna, who also died after making a will leaving the property in question to her husband Ram Shankar Lal.

Both the wills provided that the devisee was to pay off certain incumbrances existing on the property. After the death of Anpurna the property was claimed by the reversionary heirs to Munni Lal's estate, but this claim was settled by a compromise by which Ram Shankar Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property.

Held that the compromise did not convey to Ram Shankar Lal the title of the reversioners, but that he took under the will of his wife and could not therefore raise any defence to a suit for sale brought by the mortgagee which Jasoda Kunwar or Anpurna could not themselves have raised. *Ram Mewa Kunwar* v. *Ram Halus Kunwar*, L. R., 1, I. A., 167, *Govind Krishna Narain* v. *Abdul Qayyum*, I. L. R., 25 All., 540, and *Bachhe Kuwar* v. *Dharandas*, I. L. R., 28 All., 352, referred to.

Ram Shankar Lal v. Ganesh Prasad, I. L. R., 20 All. ... 451

HINDU LAW, *See* Civil Procedure Code, section 13 1

HINDU WIDOW, *See* Act No. XV of 1856, section 2 122

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INTESTACY, *See* Regulation No. V of 1799, section 7 277

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LAMBARDAR AND CO-SHARER—*Powers of lambardar to deal with co-parcenary lands—Lease for seven years.* In the absence of a custom to the contrary a lambardar has no power, without the consent of the co-sharers to grant a lease of co-parcenary land beyond such term as the circumstances of the particular year or season may require. *Jagannath* v. *Hardeo*, Weekly Notes, 1897, p 207, and *Bansidhar* v. *Dip Singh*, I. L. R., 20 All., 438, followed.

Chattray v Nawala, I. L. R., 29 All. 20

Suit for profits — Nature of liability of two lambardars for the same village—Res judicata. Where there are two lambardars for the same village, they may, as a matter of convenience, elect to divide the village between them for purposes of collection; but such division will be purely a matter of convenience and will not affect the joint liability of the lambardars to the co-sharers

A co-sharer sued two lambardars jointly for profits and the Court (an Assistant Collector) held that they were not liable to be sued jointly and dismissed the suit. The plaintiff did not appeal, but filed separate suits. *Held* that this decision did not amount to a *res judicata* as to the lambardars' right to proceed with a subsequent suit by the same co-sharer against them for profits of other years.

Kamta Singh v. Mukhta Prasad, I. L. R., 29 All. ... 287

Powers of lambardar to deal with co-parcenary lands—Lease for seven years. In the case of lease of co parcenary land granted by a lambardar, where there is any suspicion established that the lambardar has granted a long lease to the detriment of co-sharers, a heavy burden would be placed on the lessee to show that by custom or for some other cause the lambardar is authorized in granting the lease. On the other hand where the granting of the lease is shown to be for the benefit of the co-sharers and when the co-sharers personally have been shown to have derived benefit under the lease, the lease should not be set aside. *Jagan Nath* v. *Har Dayal*, Weekly Notes 1897, p. 207, *Bansidhar* v. *Dip Singh*, I. L. R., 20 All., 438, *Mukta Prasad* v. *Kamta Singh*, Weekly Notes, 1906, p. 277, and *Chattray* v. *Nawala*, I. L. R., 26 All., 20, referred to.

Muhammad Karim v. Mian Khan, I. L. R., 29 All. ... 354

See Act (Local) No. II of 1901, sections 164(2) and 166 15

LANDHOLDER AND TENANT—*Rights of zamindar in respect of house-sites and grove lands—Wajib-ul-arz—Construction of document.*] The plaintiffs purchased six plots of land consisting partly of groves and partly of land formerly the sites of houses, but since brought under cultivation, and, failing to get their names recorded as absolute owners of the plots, brought a suit virtually for a declaration of their proprietary title.

It was shown in evidence that the inhabitants of the village in which the plots in suit were situated were in the habit of selling and transferring their houses. The wajib-ul-arz set forth that the occupiers of houses had this power, but all through the entries the zamindar was recognised, and it was stated that if a new house was to be built the permission of the zamindar must be obtained. The entry in the wajib-ul-arz as to groves was to the effect that isolated trees and clumps of bamboos planted by tenants might be cut by them; as to rent-free groves, if the trees should

die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar must be obtained.

Held that the inference of law deducible from the facts stated above was that the plaintiffs were not the absolute owners of the plots purchased by them

Kishan Kunwar *v* Fatch Chand, I L R., 29 All. ... 203

LANDHOLDER AND TENANT—*Site in abadi occupied by non-agricultural tenant—Adverse possession—Licence—Act No. V of 1882 (Indian Easements Act), section* 60.] A person who was neither an agricultural tenant nor a village handicraftsman was found in possession of a house in the abadi which he and his predecessors in title had held for a period of considerably more than twelve years, without paying rent or acknowledging in any way the title of the zamindar to the site upon which it was built. *Held* that such person had acquired the absolute ownership of the site.

Bhaddar *v* Khair-ud-din Husain, I L R., 29 All. ... 193

Trees — Landholder's and tenant's rights as to trees on tenant's holding.] *Held* that in the absence of special agreement a tenant has, as against his landlord, a right to insist that so long as his tenancy continues the landlord shall not cut down trees standing on the tenant's holding. *Deoknandan* v. *Dhian Singh*, I L R., 8 All., 467, *Kunsatia* v. *Gulab Kunwar*, I L R., 21 All., 207, and *Ruttunji Edulji Shet* v. *The Collector of Thana*, 11 Moo., I A., 295, referred to

Badam *v* Ganga Dei, I L R., 29 All. 484

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LEASE, *See* Act No. XV of 1877, schedule II, article 144 503

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LIMITATION *See* Decree *ex parte* 633

——— *See* Hindu law 544

LIS PENDENS—*Contest between prior purchaser under a second mortgage and subsequent purchaser under a first mortgage—Second mortgage executed after institution of suit on first mortgage, but before summons served—"Contentious" suit—Act No IV of* 1882 *(Transfer of Property Act), section* 52.] The plaintiff was purchaser in execution of a decree based on a first mortgage of the property in suit. The defendant was in possession as a prior purchaser in execution of a decree on a second mortgage of the same property, passed in a suit to which the first mortgagee was not made a party. The second mortgage was executed after the institution of the suit on the first mortgage but before the summons had been served. *Held* that the doctrine of *lis pendens* applied, and that the plaintiff had the better title.

Where a suit is contentious in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a "contentious" one within the meaning of section 52 of the Transfer of Property Act (IV of 1882) and render the doctrine of *lis pendens* applicable.

Irrespective of the doctrine of *lis pendens* it appeared from the circumstances of the case that the defendant was cognizant of first mortgage, of the decree made on the basis of it and of the sale proceedings which took place in execution of the decree.

Faiyaz Husain Khan v. Prag Narain, I. L. R., 29 All. ... 339

——— *See* Act No. IV of 1882, sections 52, 80 and 87 .. 76

LOAN, *See* Act No. XV of 1877, sections 19 and 20; schedule II, articles 60 and 60 773

MARKET—*Right of zamindar to establish a market on his own land—Regulation No. XXVII of* 1793, *Regulation No. VII of* 1832, *section* 9—There is no legal objection to the holding by any person of a "hat" or market whenever and wherever he may please, provided that he does so on his own land and in such a way as not to be a nuisance to neighbouring landholders who have equal rights with him. *Kedarnath* v. *Raghunath*, N-W. P., H. C. Rep., 1874, p. 104, *Sheikh Bisharut Ally* v. *Seetul Misser*, N-W. P., H. C., 1869 40, *Meeta Sahoo* v. *Sheikh Surwur Ali*, 14 S. D. A., N-W. P. 439, and *Bhuruk Chowdhree* v. *The Collector of Jounpore*, N-W. P., H. C. Rep., 1867, 271, referred to.

Sukhdeo Prasad v. Nihal Chand, I. L. R., 29 All. ... 740

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MITAKSHARA, *See* Hindu law 567

MORTGAGE—*Property mortgaged not at date of execution belonging to the mortgagor—Effect of subsequent acquisition of such property by the mortgagor.*] The plaintiff in a pre-emption suit, in order to procure funds for the prosecution of his suit, executed a mortgage

comprising certain property of which he was the owner and also the property the subject-matter of the suit for pre emption. The suit for pre-emption was successful. *Held* that the mortgage took effect as regards the property the subject of the pre-emption suit from the time when the plaintiff mortgagor obtained possession by virtue of his decree in the suit. *Holroyd* v. *Marshall*, 10 H. L., at p. 210, *Collyer* v. *Isaacs*, 19 Ch. D., 342, and *Basudhar* v. *Sant Lal*, I. L. R., 10 All., 133, referred to.

Gaya Din v. Kashi Gir, I. L. R., 29 All. 163

MORTGAGE, *Same property mortgaged twice to same mortgagee—Part purchased by mortgagee under their decree on prior mortgage—Remainder liable for full amount of the subsequent mortgage.*] Sixteen villages were mortgaged by two mortgages of different dates to the same mortgagee. The mortgagee put their earlier mortgage into suit, obtained a decree, brought to sale 10 out of the 16 villages and purchased them themselves. *Held*, in a suit to sell the remaining villages in satisfaction of the second mortgage, that the remaining six villages were liable to the full extent of the second mortgage and not merely for a proportionate part of the money thereby secured. *Zahir Singh* v. *Buri Singh*, F. A. No. 63 of 1903, decided 20th April 1905, and *Bohra Thakur Das* v. *The Collector of Aligarh*, I. L. R., 28 All., 698, referred to.

Raghunath Prasad v. Jamna Prasad, I. L. R., 29 All. ... 238

——— *See* Act No. III of 1877, section 17 50

——— *See* Act No. IV of 1882, chapter IV 386

——— *See* Act No. IV of 1882, section 60 262

——— *See* Act No. IV of 1882, sections 62 and 63 471

——— *See* Act No. IV of 1882, sections 86 and 88 323

——— *See* Act No. IV of 1882, section 90 261

——— *See* Act No. IV of 1882, section 90 389

——— *See* Act No. IV of 1882, sections 92 and 93 481

——— *See* Hindu law 514

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——— Usufructuary—, *See* Act (Local) No. II of 1901, sections 20, 21 and 31 327

——— Redemption of—, *See* Hindu law 215

MUHAMMADAN LAW—*Shias—Succession—Childless widow—Rights of widow in possession in lieu of dower—Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgagee—Adverse possession.*] Under the Imamia Law a widow, if she has no issue alive at her husband's death, does not inherit any of the husband's immoveable property.

A Muhammadan widow in possession of immoveable property of her deceased husband in lieu of her dower has only a lien on the property to secure payment of the dower debt—she has no transferable interest in the property. *Mussammat Bibee Bachun Nasib* v. *Hamid Hussain*, 14 Moo., I. A., 377, and *Hadi Ali* v. *Akbar Ali*, I. L. R., 20 All., 262, referred to.

A mortgagee cannot during the continuance of the mortgage by any act of his render his possession adverse to the mortgagor. *Khairajmal* v. *Dulm*, I. L. R., 22 Calc., 290, at page 312, referred to.

The power to appoint a guardian *ad litem* is inherent in every court of civil jurisdiction Where therefore a Shia Muhammadan lady had been appointed by a civil court guardian *ad litem* of her infant children, it was held that the appointment must be presumed to be valid and that a sale in execution of the decree obtained in such a suit was binding on the minors.

Muzaffar Ali Khan v. Parbati, I. L. R., 29 All. ... 640

MUHAMMADAN LAW—*Suit for restitution of conjugal rights—Legal cruelty—Other misconduct of the plaintiff pleaded as a defence to the suit.*] In a suit for restitution of conjugal rights, the parties being Muhammadans, if the defendant raises a plea of legal cruelty, the facts to be proved to establish such a plea are similar to those which must be proved to establish a similar plea under the English law. *Moonshee Buzloor Ruheem* v *Shumsoonnissa Begum*, 11 Moo. I. A., referred to.

But in a suit for restitution brought by the husband misconduct on the plaintiff falling short of legal cruelty may be a ground for the Court refusing relief Thus where the plaintiff ... only brought his suit on account of his wife having filed a civil suit against the plaintiff's father, and in his plaint accused his wife of immorality of the most serious kind, a charge which he totally failed to substantiate, it was *held* that the Court would be justified in refusing him relief. *Mackenzie* v *Mackenzie*, [1895] A. C., 384 referred to. On the general facts of the case also it was found that the defendant had reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house, which was situated in a native State.

Husaini Begam *v.* Muhammad Rustam Ali Khan, I. L. R., 29 All. 232

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POSSESSION—*Suit for possession based on possessory title—of plaintiff's predecessor—Plaintiffs never themselves in possession—Cause of action.*] Musammat Wazir Jan, the owner of certain zamindari property, died on the 18th of December 1889, leaving no direct

heirs. After her death the property was taken possession of by the four nephews of Musammat Wazir Jan's deceased husband. One of these nephews, Bisharat, died on the 7th of August 1890, whereupon the share of which he had been in possession was appropriated by his son Kasim to the exclusion of Kasim's two sisters Ayesha Begum and Kudrat Begum. While in Kasim's possession the property, or part of it, was sold in execution of a decree against Kasim and purchased by Shi Gopal and others. On the 7th of August 1902, Kasim's sisters sued to recover their shares of the property as heirs of Bisharat.

Held by KNOX, J. *(dissentiente* Aikman, J.) that, inasmuch as the plaintiffs had never at any time been in possession of the property claimed by them, their suit would not lie. *Asher* v. *Whitlock*, L. R., 1 Q. B., 1, *Govind Prasad* v. *Mohan Lal*, I. L. R., 24 All., 137, *Narayana Rao* v. *Dharmachar*, I. L. R., 26 Mad., 514, *Pahlwan Singh* v. *Ram Bharose*, I. L. R., 27 All., 169, *Sundar* v. *Parbati*, I. L. R., 12 All., 51, and *Ismail Arif* v. *Mahomed Ghous*, I. L. R., 20 Calc., 834, distinguished. *Hudson* v. *Walker*, L. R., 7 Exch., 55, and *Butcher* v. *Butcher*, 7 B. and C., 399, referred to.

AIKMAN, J.—*Contra*. The plaintiff's father Bisharat having held a possessory title—heritable and transferable—good as against all except the true owner, there was nothing to prevent his heirs bringing the present suit. *Wali Ahmad Khan* v. *Ajudhia Kundu*, I. L. R., 13 All., 537, *Govind Prasad* v. *Mohan Lal*, I. L. R., 24 All., 137, *Asher* v. *Whitlock*, L. R., 1 Q. B., 1, *Doe d. Pritchard* v. *Jeaneri*, 8 C. and P., 99, *Pahlwan Singh* v. *Ram Bharose*, I. L. R., 27 All., 169, *Babu Ram* v. *Banke Bihari Lal*, Weekly Notes, 1906, p. 184, *Narayana Rao* v. *Dharmachar*, I. L. R., 26 Mad., 514, and *Sundar* v. *Parbati*, I. L. R., 12 All., 51, referred to.

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PRACTICE, *See* Act No. XLV of 1860, section 211 587

PRE-EMPTION—*Price stated in sale-deed alleged to be fictitious—Burden of proof.*] When a plaintiff pre-emptor comes into Court alleging that the price entered in the sale-deed is fictitious, it rests on him to give some *primâ facie* evidence that this is the case. But comparatively slight evidence is sufficient for such purpose, and it will then be for the parties to the sale to show that the price alleged to have been paid was actually paid. *Bhagwan Singh* v. *Mahabir Singh*, I. L. R., 5 All., 184, *Shoo Purgash Dube* v. *Dhanraj Dube*, I. L. R., 9 All., 226, and *Agar Singh* v. *Raghuraj Singh*, I. L. R., 29 All., 471, referred to. *O'Conor* v. *Ghulam Haidar*, I. L. R., 28 All., 617, not followed.

Abdul Majid *v.* Amolak, I. L. R., 29 All. 619

———— *Sale of property to a stranger—Re-sale to a co-sharer before a suit for pre-emption is brought.*] Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger, but, before a suit for pre-emption is brought passes back into the hands of co-sharer, a suit for pre-emption cannot be maintained, and this rule is not affected by the fact that the co-sharer in whom the property sold to a stranger revests was a party to its sale to a stranger. *Bhagwan Das* v. *Mohan Lal*, I. L. R., 26 All., 421, referred to.

Inakat Husain v. Rashid-ud-din, I. L. R., 29 All. ... 135

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RE-EMPTION—*Wajib-ul-arz—Custom—Effect of perfect partition, no new wajib-ul-arzes for the new mahals being framed.*] Where a

village, in which, according to the majority of decisions of pre-emption existed amongst the co-sharers was divided by perfect partition into three mahals, but no fresh wajib-ul-arzes were framed for the new mahals, it was *held* that the custom was either abrogated in its entirety, or remained applicable in its entirety to the co-sharers in the various new mahals: *inter alia* *Robert Peirard v. Hashmat Ali*, infra, p. 209, discussed *Dilgamjan Singh* v. *Kalka Singh*, I. L. R., 23 All., referred to.

Gobind Ram v. Masih-ullah Khan, I. L. R., 29 All. .. 295

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RES JUDICATA—*Suit to set aside a decree on the ground of fraud—Sole question raised in the suit already decided in a former suit—Section 108 of the Code of Civil Procedure.*] [illegible] set aside a decree on having been obtained against the plaintiff by fraud substantially the only ground relied upon was that [illegible] had been improperly substituted against the plaintiff as of full age when in fact he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under section 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable. *Puran Chand* v. *Shadat Rai*, I. L. R., 29 All., 212, followed. *Khagendra Nath Mahata* v. *Pran Nath Roy*, I. L. R., 29 Calc., 395, distinguished.

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—— for damages for false imprisonment, *See* False imprisonment ... 44
—— for declaration of right to receive fees as "Chowdhris" of certain bazars — *Suit not maintainable.*] The plaintiffs sued for a declaration that they were the "Chowdhris" of the bazars in the villages Muhammadbad Ghona, Khairabad and Behna, and that the defendants were not the "chowdhris" of the said bazars and were not entitled to take chowdhris' dues. *Held* that such a suit was not maintainable. *Bhinik Chowdhree* v. *The Collector of Jaunpur*, N.-W. P., H. C. Rep., 1867, p. 271, *Beharee Lall* v. *Baboo*, N.-W. P., H. C. Rep., 1867, p. 80, and *Ram Deshul* v. *Chukhoo*, N.-W. P., H. C. Rep., 1869, p. 291, followed.
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SUIT to set aside a decree on the ground of fraud.—*No other relief claimed—Jurisdiction*.] Save under special circumstances, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. *Meera Lal Thakur* v. *Bhagun Jha*, 13 B. L. R., App., 11, *Abdul Mazumdar* v. *Mahomed Gazi*, I. L. R. 21 Calc., 605, *Iran Nath Roy* v. *Mahesh Chandra Chowdhry Mukta*, I. L. R., 24 Calc., 646, *Aedar Nath Mukerjee* v. *Peramma Kumar Chatterjee*, 6 C. W. N. 650, *Behari Lal* v. *Bakhe Ram*, I. L. R., 25 All., 38, *Narain Dass* v. *Nanda Lall Bose*, I. L. R., 29 Calc., 908, and *Hiteman* v. *Abdool Aziz*, 4 C. L. R., 366, referred to.

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WILL—*Separated Hindu domiciled in the United Provinces—Revocation of will—Evidence—Presumption.*] A separate Hindu residing at Meerut executed a will on the 20th of January 1885 and registered the same in the office of the District Registrar on the 22nd of January of the same year. The testator died on the 16th of October 1899. On the 8th of July 1902 a suit was instituted by certain persons who claimed the property of the testator as his next of kin against the Collector of Meerut who had taken possession of the property as trustee under the terms of the will for purposes therein set forth. The plaintiffs alleged that the testator had revoked the will of the 20th of January 1885, and tendered evidence to prove that on a certain occasion the testator had said that he had revoked his will. On the death of the testator the original will was not to be found; but, on the other hand, it was shown that persons interested in the disappearance of the will had had access to the house of the testator since his death.

Held that evidence that the testator had said that he had torn up the will was not admissible. *Staines* v. *Stewart and Jones*, 2 Sw. and Tr., 320, *Doe dem Shallcross* v. *Palmer*, 16 Q. B., 747, and *Keen* v. *Keen*, 3 P. and D., 105, referred to

Held also that the presumption of English law that if a will is traced to the testator's possession and is not forthcoming at his death it has been destroyed by him, *animo revocandi*, would, at least, not be so strong in India as in other countries where wills are taken greater care of, and under the circumstances disclosed by the evidence in the present case did not arise at all. *Palmore* v. *Whatton*, 3 Sw. and Tr., 449, *Finch* v. *Finch*, 1, P. and D., 371, and *Brown* v. *Brown*, 3 E. and B., 870, referred to.

Shiv Sahitri Prasad v. The Collector of Meerut, I. L. R., 29 All. 82

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APPELLATE CIVIL.

1906
June 1

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

SUNDAR LAL AND OTHERS (PLAINTIFFS) *v.* CHHITAR MAL AND OTHERS (DEFENDANTS) *

Civil Procedure Code, section 13—Res judicata—Hindu law—Joint Hindu Family—Nature of son's title.

Held that the dismissal of a suit for redemption of a mortgage of joint family property brought by the father in a joint Hindu family alone would not be a bar to a subsequent suit for redemption by the sons, inasmuch as the sons' title was not through their father, but was separate and independent. *Ram Narain* v. *Bishesher Prasad* (1) referred to.

THE facts of this case are as follows:—

One Man Singh was the owner of an undivided 3 biswa share in the village of Ilauli. In 1869 the descendants of Man Singh (and others) executed a mortgage with possession in favour of Chhitar Mal. Subsequently the property of Man Singh's family was made into a separate patti. The family also separated into two groups, which may be described as the Jhanda group, owning 1 biswa 8 biswansis, and the Rupa group, owning 1 biswa 12 biswansis of the property in suit.

In 1888 a suit for redemption was brought by Jhadda, Khushali, Kallu, Parbati, Lado, Changa Sri Ram and Saidhu—of these Jhadda alone represented the Rupa group while Kallu, Parbati and Lado represented the Jhanda group. A decree was obtained in this suit, but the redemption money was not paid in within the time limited.

* Second Appeal No. 340 of 1905 from the decree of A. B. Bruce, Esq., District Judge of Agra, dated the 3rd of February 1905, confirming the decree of Babu Rajnath Prasad, Subordinate Judge of Agra, dated the 7th of July 1904.

(1) (1888) I. L. R., 10 All., 411.

In 1896 a second suit for redemption was brought, in which the parties were arrayed as follows:—

(1) Jhadda, Sunder Lal } Rupa group v. (1) Chhitar Mal.

(2) Sri Ram, Saidka } (2) Kallu, Jalo } Jhanda group.

In the result Sundar Lal withdrew his suit with liberty to bring a fresh suit, while the suit of the remaining plaintiffs was dismissed.

A third suit was then brought by Sundar Lal and others for redemption of the same mortgage, and in this all the surviving representatives of both groups were arrayed as plaintiffs, except Jhadda and Kallu, who were made defendants.

The Court of first instance (Subordinate Judge of Agra) dismissed the suit as barred by the rule of *res judicata*, and on appeal this decision was confirmed by the District Judge.

The plaintiffs accordingly appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Surat Chandra Chaudhri*), for the appellants.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the respondents.

STANLEY, C.J., and KNOX, J.—This appeal arises out of a suit brought by several plaintiffs, who prayed that a decree might be granted them for recovery of possession by redemption of certain property set out in the schedule attached to the plaint. They also asked for mesne profits. The plaintiffs may be divided into representatives of two separate groups, and for the purposes of convenience the one group is termed in this judgment the Rupa group and the second group the Jhanda group. In this appeal we are concerned only with the Rupa group. Both the Courts below have held that their claim for recovery possession by redemption is barred by reason of a suit namely, suit No. 125 of 1896, in the Court of the Subordinate Judge of Agra, in which one Jhadda and others brought a similar claim for redemption affecting the property the subject matter of the present appeal against Chhitar Mal, who in both cases was arrayed as one of the defendants. The said Chhitar Mal is mortgagee in possession. The sole question with which we are concerned in this appeal is

whether, as the Courts below have found, the present claim is barred by reason of the rule of *res judicata*. The lower appellate Court held that, for purposes of section 13 of the Code of Civil Procedure, Jhadda's sons, who were not arrayed as plaintiffs in the suit of 1896, claim under their father and are consequently bound by the dismissal of that suit. The learned Judge holds that the sons of Jhadda acquired their title through Jhadda. This is not a correct view of the law. As pointed out in *Ram Narain* v. *Bisheshar Prasad* (1), the Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father, and he does not claim under his father within the meaning of section 13 of the Code of Civil Procedure. A person is said to claim under another when he derives his title through that other by assignment or otherwise. The result of this error on the part of the Judge is that we cannot decide the present appeal upon the findings recorded by the lower appellate Court. It is necessary for a right determination of the matters in dispute between the parties that we have findings by the Court below upon the following issues, namely:—

(1) In what capacity did Jhadda sue in suit No. 125 of 1896 in the Court of the Subordinate Judge of Agra? Did he claim the right to redeem in common for himself and his sons and others who were interested in the right of redemption; or did he claim only in his own behalf?

(2) Whether any, and, if so, which of the present appellants were living at the date of the institution of the suit above named?

(3) What are the respective shares to which the plaintiffs appellants are entitled in case their claims are not barred?

We refer these issues for trial to the lower appellate Court and direct that Court to take such additional evidence as may be relevant. The Court will return its findings together with the evidence, and ten days will be allowed to either party to take objections to the findings if so advised.

Cause remanded.

(1) (1888) I. L. R., 10 All., 411.

1906
June 6.

Before Mr. Justice Banerji and Mr. Justice Aikman.

NARAIN DAS (JUDGMENT-DEBTOR) v. TIRLOK TIWARI (DECREE-HOLDER).*

Hindu law—Succession—Effect of a wife deserting her husband and becoming a prostitute.

Held that the fact of a Hindu woman having deserted her husband and become a prostitute did not have the result of entirely severing all connection between herself and her husband. The husband therefore might still be heir to property acquired by the wife since she left him. *Subbaraya Pillai* v. *Ramasami Pillai* (1) and *Bisheshur* v. *Mata Ghulam* (2) followed. *Musammat Ganga Jati* v. *Ghasita* (3) referred to. *Tara Munee Dossea* v. *Motee Baneanee* (4) and *In the goods of Kaminey Money Bewah* (5) dissented from.

THE facts out of which this appeal arose are as follows:—Some fifteen or sixteen years ago one Musammat Samundra Kuar, the wife of Tirlok Tiwari, deserted her husband and became a prostitute. After such desertion Musammat Samundra Kuar obtained a decree against Narain Das and others for certain immovable property with costs of suit. The decree-holder having died, Tirlok Tiwari her husband, sought to execute the decree as her legal representative. The Court of first instance (Munsif of Rasra) dismissed Tirlok's application, holding that under the circumstances he could not under the Hindu law be heir to Samundra Kuar. But on appeal, this order was set aside by the District Judge. The judgment-debtor thereupon appealed to the High Court.

Munshi *Haribans Sahai* (for whom Munshi *Jang Bahadur Lal*), for the appellant.

Munshi *Govind Prasad*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application made by the first respondent for execution of a decree obtained by Musammat Samundra Kuar against the appellant Babu Narain Das. She was the wife of the respondent Tirlok Tiwari, but left him fifteen or sixteen years ago and became a prostitute. The decree was obtained by her after she had left her husband the respondent. She having died, the respondent

* Second Appeal No. 601 of 1905, from a decree of Lala Baij Nath, Rai Bahadur, District Judge of Ghazipur, dated the 30th of March 1905, reversing a decree of Babu Manmohan Sanyal, Munsif of Ballia, dated the 3rd of December 1904.

(1) (1898) I. L. R., 23 Mad., 171.
(2) N.-W. P., H. C. Rep., 1870, p. 300.
(3) (1876) I. L. R., 1 All., 46.
(4) (1846) 7 Sel. Reps., 378.
(5) (1884) I. L. R., 21 Calc., 597.

claims as her legal representative to execute the decree. The application was opposed by the appellant, judgment-debtor, on the ground that the unchastity and degradation of Musammat Samundra Kuar severed the tie of relationship between herself and her husband and that consequently he was not her heir and not entitled to make the application. This objection prevailed in the Court of first instance, but was overruled by the lower appellate Court. The judgment-debtor appeals and repeats the objection put forward by him in the Courts below. The first, second and third pleas taken in the memorandum of appeal raise the issue as to whether the respondent was in fact the husband of the deceased. These have been disposed of by a finding in favour of the respondent upon an issue referred to the lower Court. The only question with which we have now to deal is whether the degradation of Musammat Samundra Kuar had the effect of dissolving the tie of relationship between her and the respondent. The learned vakil for the appellant relies upon a passage on page 878 of Mayne's Hindu Law, sixth edition, where the learned author says:—"Want of chastity causing a woman to become degraded and outcaste, has been held to sever the tie of kindred between herself and her own natural family, and *a fortiori* between herself and her husband's family, so that if she dies leaving property acquired by her while degraded and outcaste, none but those who had fallen into a similar position could claim to be her heirs. If this principle is sound, the converse of the proposition ought equally to apply, if a degraded female was claiming as heir to one who was undegraded." Mr. Mayne admits that he is not aware of any native authority on the point, but bases his remarks on a judgment of the Calcutta High Court in *In the goods of Kamineey Money Bewah* (1). He does not pronounce any opinion of his own whether this proposition is or is not sound. In that case Sale, J., held that where a woman becomes degraded and an outcaste the tie of kindred between herself and her own natural family or her husband's family ceases. With all deference to the learned Judge we are unable to agree with this view. No authority from the texts of Hindu Law has been cited in the judgment in

(1) (1894) I. L. R., 21 Calc., 697.

support of it. The learned Judge relies on the case of *Tara Munnee Dossea* v. *Motee Buneanee* (1) and two decisions of the Madras High Court. The question in those cases was who under the Hindu Law was the heir to a degraded woman, whether it was one who was also degraded or one who was not degraded, and it was held that the former had the preference. The particular question before us was not considered or determined in those cases. It is true that in the case of *Tara Munnee Dossea* v. *Motee Buneanee* (1) the Pandit of the Sudder Court stated that the relation of a married and respectable daughter to the outcaste mother had been severed, but he cited no authority. The question before us directly arose and was considered by the Madras High Court in the case of *Subbarayar Pillai* v. *Ramaswami Pillai* and another (2). In that case a person who was the son of the husband of a degraded woman by another wife claimed to be her heir. It was held that the step-son was the heir. If the step-son is an heir to a degraded woman *a fortiori* her husband is also her heir. In the case last mentioned Subrahmania Ayyar and Boddam, JJ., held in a lucid and well reasoned judgment that "prostitution does not sever the legal relation and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family." With this judgment we are in full accord. It is also consistent with what was decided by this Court in the case of *Bisheshar* v. *Mata Ghulam* (3). In that case it was held "that the degradation of the husband from caste does not dissolve the marriage tie." On the principles laid down in that case the converse equally applies, and the degradation of a wife cannot sever the tie of relationship. In the case of *Musammat Ganga Jati* v. *Ghasita* (4) a Full Bench of this Court, held "that unchastity in a woman does not incapacitate her from inheriting *stridhan*." This is an authority against the view that unchastity and degradation dissolve the tie of relationship between the degraded woman and her family. It is true that an unchaste wife cannot inherit property, but that is because, under the Mitakshara Law it is only

(1) (1846) 7 Sel. Rep., page 273
(2) (1899) I. L. R., 23 Mad., 171.
(3) N.-W. P., H. C. Rep., 1870, p. 300.
(4) (1878) I. L. R., 1 All., 46.

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a chaste wife who can inherit to her husband or obtain maintenance. By her degradation a woman does not cease to be a Hindu unless she becomes a convert to some other religion, and therefore the rule of succession to her property would be the ordinary rule of Hindu Law. In the present case we are not aware of any authority of Hindu Law, nor has any been cited to us, in support of the proposition the appellant contends for. As Musammat Samundra Kuar did not leave any heir nearer than the respondent, the latter is her legal representative and as such competent to apply for execution of the decree obtained by her. The appeal fails and we dismiss it with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1906
June 7.

Before Mr Justice Richards.

EMPEROR *v.* MEHRBAN HUSAIN AND OTHERS.*

Criminal Procedure Code, section 203—Complaint—Jurisdiction—Dismissal of complaint no bar to the cognizance of a fresh complaint in pari materiâ.

There is nothing to prevent a Magistrate from entertaining a second complaint made against the same person even though the second complaint may be connected with a previous complaint which has already been dismissed under the provisions of section 203 of the Code of Criminal Procedure. *Queen-Empress* v *Umedan* (1) followed. *Dwarka Nath Mondul* v. *Bani Madhab Banerji* (2) and *Mir Ahwad Hossein* v. *Mahomed Askari* (3) referred to. *Queen-Empress* v. *Adam Khan* (4) distinguished.

On the 20th of September 1905 Musammat Mumtaz-un-nissa filed a complaint in the Court of a Deputy Magistrate at Moradabad, charging Mohrban Husain and others with offences under section 148, 337 and 458 of the Indian Penal Code. She stated that the accused had carried off her daughter Tabarak-un-nissa, who, she alleged, had already been married to one Mehdi Hasan, from her house in order secretly and wrongfully to confine her, and to compel her marriage with one Kallu. The Deputy Magistrate, after recording the statement of the complainant, directed

* Criminal Reference No. 245 of 1906.

(1) Weekly Notes, 1895, p. 86. (3) (1902) I. L. R., 29 Calc., 726.
(2) (1901) I. L. R., 28 Calc., 652. (4) (1899) I. L. R., 22 All., 106.

a police inquiry under section 202 of the Code of Criminal Procedure, the result of which was submitted to the Deputy Magistrate on the 14th of November. The Deputy Magistrate then proceeded to record the evidence of several witnesses, and finally on the 5th of December 1905 dismissed the complaint, under section 203 of the Code of Criminal Procedure, "for want of proof." On the 4th of December 1905 Mehdi Hasan, the alleged husband of Tabarak-un-nissa, filed a similar complaint against Mehrban Husain and others, based upon the same facts, but charging offences under sections 365 and 366 against the accused. On this complaint, however, the Deputy Magistrate, considering that the two cases were distinguishable and that Mehdi Hasan's complaint disclosed a *prima facie* case against the accused, committed the accused to the Court of Session.

The Sessions Judge was of opinion that the Deputy Magistrate was practically *functus officio* when he had dismissed Mumtaz-un-nissa's complaint, and that therefore the commitment to him on Mehdi Hasan's complaint was illegal. He accordingly referred the case to the High Court, asking that the commitment might be quashed.

Mr. *B. E. O'Conor*, in support of the reference.

The officiating Government Advocate (Mr. *W. Wallach*), for the Crown.

RICHARDS, J.—This is a reference by the Sessions Judge at Moradabad, suggesting that a commitment against the six persons named as opposite parties should be quashed. The powers of the High Court to quash a commitment are those conferred by section 215, Criminal Procedure Code, and in my opinion there is no ground for quashing the commitment in the present case. It appears that on the 20th of September 1905 one Musammat Mumtaz-un-nissa filed a complaint in the Deputy Magistrate's Court, in which she accused the persons I have mentioned above with offences under sections 148, 337 and 458, Indian Penal Code. I may here remark, although it may not be very material, that the learned Sessions Judge is wrong in stating in his reference that the complaint was laid under sections 365 and 366 of the Indian Penal Code. A considerable amount of evidence

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was taken, but on the 5th of December, without having issued notice to the opposite party, he dismissed the complaint. Without in any way wishing to prejudge the case, I think events have shown that it is possible that the learned Deputy Magistrate was not quite prudent in so dismissing the complaint. The woman's complaint had reference to the taking away of her daughter by the opposite party, and to an alleged attempt to make her transfer her property to her brother, a son of the complainant, also to alleged wrongful confinement of herself and to the forcing of the daughter into a marriage with another person. On the 4th December, *i.e.*, the day before the dismissal of the mother's complaint, Mehdi Hasan filed a further complaint against the same persons under sections 365 and 366. The acts complained of were no doubt the same as the acts that the girl's mother had complained of, although the offences suggested by the two complaints were different. The learned Deputy Magistrate summoned witnesses on this second complaint for the 13th and on the 14th notices were issued to the accused. Evidence was also recorded, and on the 15th February 1906 the commitment order which it is now sought to quash was passed. It is contended on behalf of the opposite parties that the Deputy Magistrate had absolutely no jurisdiction to entertain the second complaint, inasmuch as he had already dismissed in the manner I have stated the first complaint made by the girl's mother. I can find nothing in the Criminal Procedure Code which prevents a Magistrate from entertaining a second complaint made against the same person, even though the second complaint may be connected with a previous complaint which has already been dismissed under the provisions of section 203. No doubt a Magistrate to whom a second complaint was made might take into consideration the fact that a previous complaint had been made and dismissed. This, however, is not the question before me. The question before me is—had the Magistrate jurisdiction to entertain the complaint of the husband after he had dismissed the complaint of the mother? If he had, the present commitment cannot be quashed by me. In my judgment the Magistrate had jurisdiction, and was bound to entertain the second complaint and deal with it according to law. A number of authorities have been cited, amongst others,

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the case of the *Queen-Empress* v. *Umedan* (1). In that case a Bench of two judges considered that a Magistrate could take cognizance of a second complaint made by the same complainant. This is a very much stronger case than the present one, where the second complaint was made by a different person and for different offences, though possibly grounded on more or less the same facts. To the same effect is the case of *Dwarka Nath Mondul* v. *Beni Madhab Banerji* (2) and that of *Mir Ahwad Hossein* v. *Mahomed Askari* (3). On the other side the case of *Queen-Empress* v. *Adam Khan* (4) is cited. The facts of this case are quite different from the facts of the present case, and the learned Judge there cited with approval the decision that I have already referred to of *Queen-Empress* v. *Umedan*. In my judgment the mere fact that the complaint of the husband was made the day before the dismissal of the mother's complaint can make no difference whatever. I see no reason therefore to quash the commitment and this is my answer to the reference. Let the record be returned.

1906
July 2.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ALIM-ULLAH KHAN (OBJECTOR) v. ABADI BEGAM (APPLICANT)*

Act No. VIII of 1890 (Guardians and Wards Act), section 10—Application and minor—Paternal uncle or mother—Muhammadan law.

The paternal uncle has no legal right under the Muhammadan law to the guardianship of the property of his minor nephews and nieces superior to that of their mother. *Shaikh Ahmadeed Mullick* v. *Syfoon Bibee* (5) referred to

MUSAMMAT Abadi Begam applied under section 10 of the guardians and Wards Act 1890, to be appointed guardian of her minor son and two minor daughters. This application was opposed by Alim-ullah, a brother of the minors' deceased father. The objections raised by Alim-ullah were supported largely by the evidence of Karamat-ullah, another brother of the minors'

* First Appeal No. 30 of 1906 from an order of J. H. Cumings, Esq., Additional District Judge of Aligarh, dated the 17th of February 1906.

(1) Weekly Notes, 1895, p. 86.
(2) (1901) I. L. R., 28 Calc., 852.
(3) (1892) I. L. R., 20 Calc., 725.
(4) (1894) I. L. R., 22 All., 108
(5) (1866) 6 W. R., M. R., 125

deceased father. The lower Court (Additional District Judge of Aligarh) found that Karamat-ullah held a decree against the father of the minors, and had committed flagrant perjury in his attempt to support the case set up by Alim-ullah, and that there was good reason to suppose that he was acting in concert with Alim-ullah, and that the interests of both were antagonistic to those of the minors. The Court therefore appointed the mother, in default of anyone better entitled, to be guardian of the property of the minors. Against this order Alim-ullah appealed to the High Court.

Mr. *A. H. C. Hamilton*, for the appellant.

Maulvi *Abdul Majid*, for the respondent.

BANERJI and AIKMAN, JJ.—This is an appeal under section 47 of the Guardians and Wards Act from an order of the District Judge appointing the respondent, the mother of three minors of tender years, guardian of their persons and property. The appellant is a paternal uncle of the minors, and claims to have a preferential right to be appointed their guardian. He has no right to be appointed guardian of the persons of the minors, two of whom are girls, and the third is a boy of six. As regards the guardianship of the property, the paternal uncle has no legal right under the Muhammadan law to the guardianship of the property of the minors any more than the mother—see *Shaikh Alimodeed Moallem* v. *Musammat Syfoora Bibee* (1) and Tagore Law Lectures, 1873, p. 479. The sole question therefore to be considered is whether it would be for the welfare of the minors to appoint the appellant, their uncle, as guardian of their property rather than their mother. Having regard to the circumstances disclosed in the judgment of the District Judge, it is clear that the appointment of the appellant to the guardianship of the property would not be advisable. Apparently the appellant and his brother, who holds a decree against the father of the minors, are working together. We think, therefore, the learned Judge was fully justified in appointing the mother as guardian of the persons and property of the minors. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) (1866) 6 W. R., M. R., 125.

1906
July 8.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SADHO SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* THE MAHARAJA OF BENARES (DECREE-HOLDER).*

Act No IV of 1882 (Transfer of Property Act), sections 88 and 90—Execution of decree—Decree to be executed a combination of a decree for sale and a personal decree.

Where a decree in a suit for sale of hypothecated property is both a decree for sale of the property under section 88 and a personal decree under section 90 of the Transfer of Property Act, 1882, there is no need for the decree-holder to apply for a separate decree under section 90, and if he does so and his application is rejected, this will not operate as a bar to his executing the decree against the judgment-debtor personally.

THIS appeal arose out of an application for execution.

The decree sought to be executed was for payment of money by instalments, with a power, in default, to bring to sale certain hypothecated property, and, in the event of such sale not realizing the whole decretal amount, to recover the balance from the person of the judgment-debtors. It was, in short, a combination of a decree under section 88 and a decree under section 90 of the Transfer of Property Act, 1882. The present application was for arrest of the judgment-debtors. This was opposed on the ground that the decree-holder had on a previous occasion applied for a decree under section 90 and his application had been rejected. The present application was allowed by the Court below. Hence this appeal.

Mr. *M. L. Agarwala*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Babu *Satya Chandra Mukerji*, for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for the execution of a decree made upon a compromise. The decree directs sale of certain property which was hypothecated by the appellants as sureties for a lessee. It further directs that in the event of the proceeds of the sale not being sufficient for the discharge of the debt, the defendants would be personally liable for the balance due. The hypothecated property has been sold, but as the proceeds of the sale did not satisfy the decree, the present application was made for the arrest of the judgment debtors. It was opposed on the ground that the decree-holder

* First Appeal No. 97 of 1906, from the decree of Maulvi Abdul Majid, Abdin, Subordinate Judge of Jaunpur, dated the 20th of April 1904.

ought to obtain a decree under section 90 of the Transfer of Property Act, and that he had already made an application for such a decree, which was disallowed, and that the rejection of that application is a bar to the present application. This objection has been overruled by the Court below, but it has been repeated in the appeal before us. In our judgment the contention has no force. The decree must be deemed to be a combined decree under sections 88 and 90 of the Transfer of Property Act. Therefore it was not necessary to apply for a decree under section 90, and any order that may have been passed upon an application for a decree under section 90 was an order passed without jurisdiction and cannot vary or supersede the decree as originally made. The appeal therefore fails. We dismiss it with costs.

Appeal dismissed.

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SADHO SINGH v. THE MAHARAJA OF BENARES.

Before Mr. Justice Banerji and Mr. Justice Richards.

1906 *July* 4.

BANSIDHAR (PLAINTIFF) *v.* SITAL PRASAD AND ANOTHER (DEFENDANTS) *

Act No. I of 1877 (Specific Relief Act), section 21—Arbitration—Alleged revocation of submission—For what cause submission may be revoked.

Although no party to an agreement of reference can revoke the submission to arbitration, unless for good cause, and a mere arbitrary revocation of the authority is not permitted, the fact, if proved, that the arbitrator was in fraudulent collusion with one of the opposite side might be a good ground for revocation of the submission. *Peetoojee Nussurwanjee* v. *Mawcksee & Co.*, (1) and *Tahal* v. *Bishoshar* (2) referred to.

THIS was a suit for recovery of the plaintiff's share in the assets of a partnership business, which the plaintiff alleged to have been dissolved on the 17th of February 1904. The plaintiff in his plaint admitted that the matters in dispute between him and the defendant Sital Prasad had been referred, on the 22nd March 1904, to the arbitration of Sohan Lal the other defendant, but he alleged that Sohan Lal had colluded with Sital Prasad and he (the plaintiff) had therefore revoked his submission to arbitration. The defendant Sohan Lal pleaded that

*Second Appeal No. 396 of 1906 from a decree of D. R. Lyle, Esq., District Judge of Moradabad, dated the 7th of February 1905, modifying a decree of Pandit Girraj Kishore Dat, Subordinate Judge of Moradabad, dated the 6th of September 1904.

(1) (1863) 12 Moo. I. A., 112 (2) (1885) I. L. R., 8 All., 57.

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not only did the submission to arbitration subsist at the date of the suit, but an award had actually been filed. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit as being barred by the operation of section 21 of the Specific Relief Act 1877, and this decree was on appeal upheld by the District Judge. The plaintiff thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and *Moti Lal Nehru*, for the appellant.

Babu *Jogindro Nath Chaudhri*, Mr. *G. W. Dillon*, Dr. *Satish Chandra Banerji* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

BANERJI and RICHARDS, JJ.—The suit of the plaintiff appellant has been dismissed by the Courts below on the ground that section 21 of the Specific Relief Act is a bar to it. It appears that the plaintiff and the first defendant executed an agreement of reference to arbitration on the 22nd of March 1904. The plaintiff states in his plaint that he revoked the submission to arbitration on the ground that the arbitrator was colluding with the defendant, and that he was therefore entitled to maintain the present suit. The defendant, on the other hand, asserted that not only did the submission to arbitration subsist at the date of the suit but an award had been made before the suit was filed. The Courts below have not considered whether the plaintiff revoked the reference to arbitration. It was held by this Court in *Tahal* v. *Bisheshar* (1) that the contract, the existence of which would bar a suit under section 21 of the Specific Relief Act, must be an operative contract at the date of the suit. In the present case the plaintiff alleged, as stated above, that the submission had been revoked. It has been held by their Lordships of the Privy Council in *Pestonjee Nussurwanjee* v. *Manockjee & Co.* (2), that no party to an agreement of reference "can revoke the submission to arbitration, unless for good cause, and that a mere arbitrary revocation of the authority is not permitted." The cause for revocation alleged in this case is that the arbitrator was in fraudulent collusion with the defendant No. 1. If this statement is true, there might be good cause for revoking the submission. Again, if an award has been made, the submission no longer exists, and

(1) (1886) I. L. R., 8 All., 57. (2) (1868) 12 Moo., I. A., 112.

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it would be necessary to determine whether the award is a valid award and would bind the parties. If the award is valid, the plaintiff is not entitled to maintain the suit. We must therefore have findings on the following issues, which we refer to the Court below under section 566 of the Code of Civil Procedure:—

(1) Was the submission to arbitration revoked by the plaintiff? If so, when?

(2) Was the arbitrator guilty of collusion with the defendant No. 1 and dishonesty?

(3) Was an award made by the arbitrator, and, if so, when?

(4) Is the award legally valid and binding on the plaintiff?

The Court will take such evidence relevant to the above issues as may be tendered by the parties. On receipt of the findings ten days will be allowed for objections.

Cause remanded.

1906

July 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

DIP SINGH AND OTHERS (DEFENDANTS) *v.* RAM CHARAN (PLAINTIFF).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 164 (2) and 156—Lambardar and co-sharer—Liability of successor in office for uncollected profits

Held that the successor in title of a deceased lambardar is not liable to account for profits which his predecessor may have failed to collect or which he permitted to remain uncollected owing to negligence or misconduct.

THIS was a suit for profits brought against the defendants as lambardars. The claim was in respect of the years 1307, 1308 and 1309 Fasli; but the defendants had been lambardars for a portion only of that period, previous to which one Dhanuk Singh had been lambardar. The Court of first instance (Assistant Collector of Farrukhabad), upon an issue framed by it whether the defendants were liable to pay profits on the basis of the jamabandi or of actual collections for the period of their own incumbency as well as that of their predecessor Dhanuk Singh, found that the defendants were liable to pay profits for the period of the

* Second Appeal No. 1284 of 1904, from a decree of H. W. Lyle, Esq., District Judge of Farrukhabad, dated the 6th of June 1904, confirming a decree of Kunwar Mahindra Singh, Assistant Collector of Farrukhabad, dated the 23rd of February 1904.

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incumbency of Dhanuk Singh as lambardar, and not merely actual collections but such as might have been collected owing to the negligence or misconduct of Dhanuk Singh. The Court found that there had been negligence and misconduct on the part of Dhanuk Singh in the collection of rents and upon this basis fixed the amount for which a decree was given against the defendants. On appeal by the defendants the decree of the Assistant Collector was affirmed by the District Judge. The defendants appealed to the High Court.

Munshi *Gokul Prasad* (for whom Babu *Sital Prasad Ghosh*), for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

STANLEY, C. J., and KNOX, J.—This appeal arises out of a suit for profits brought against a lambardar. The profits claimed are for the years 1307, 1308 and 1309 Fasli. Dhanuk Singh was the lambardar for the years 1307 and 1308 and also part of 1309 Fasli. He died in the year 1309 and was succeeded by the defendants in the present litigation. The Court of first instance settled, amongst other issues, the following issue:—"Whether the defendants are liable to pay profits on the basis of *jama bandi* or of actual collections for the period of their own incumbency as well as of their predecessor Dhanuk Singh." Upon this issue he found that under section 164 of the North-Western Provinces Tenancy Act the defendants were liable to pay profits, not merely in respect of the collections in the time of Dhanuk Singh on the basis of the actual collections, but in respect of sums which remained uncollected owing to the negligence or misconduct of Dhanuk Singh. He found that there was negligence and misconduct in the collection of rents by Dhanuk Singh and on this basis fixed the amount for which the defendants were responsible. On appeal the learned District Judge accepted the view of the law propounded by the Court of first instance and dismissed the defendant's appeal.

We are of opinion that that view is erroneous. Section 164 enables a co-sharer to sue a lambardar for his share of the profits of the mahal, and sub-section (2) enables the Court in any such suit to award to the plaintiff not only a share of the profits actually collected but also of such sums as the plaintiff may

prove to have remained uncollected owing to the negligence or misconduct of *the defendant*. It is to be noticed that the negligence or misconduct here referred to is the negligence or misconduct of *the defendant*, not of the lambardar. In section 166 the word "lambardar" is defined as including "heirs, legal representatives, etc., of the lambardar" and the Courts below have put the interpretation upon the word "defendant" as used in section 164 as meaning the lambardar who is the defendant in the suit, or the lambardar of whom he is the representative. At first sight it might appear that the heir or representative of the lambardar would be so liable in respect of the negligence or misconduct of his predecessor in title, but if this had been the intention of the Legislature, we should expect to find in sub-section (2) instead of the word "defendant" the word "lambardar." That word does not occur in sub-section (2) of section 164. We are therefore of opinion that the successor in title of a deceased lambardar is not liable to account for profits which his predecessor may have failed to collect or which he permitted to remain uncollected owing to negligence or misconduct.

This being so, as the learned District Judge has decided the case upon this preliminary point, and we are unable to agree in the view which he has taken, we allow the appeal, set aside the decree of the Court below, and under the provisions of section 562 of the Code of Civil Procedure, remit the appeal to that Court with directions that it be reinstated in the file of pending appeals in its original number and be disposed of on the merits. The defendants appellants will have the costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

1906
July 4.

Before Mr. Justice Banerji and Mr. Justice Richards.

JAGAN NATH PRASAD (PLAINTIFF) *v.* TORI AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 45—Act (Local) No. II of 1901 (Agra Tenancy Act), sections 193 and 57—Joint suit for arrears of rent of several holdings.

Held that the provisions of section 45 of the Code of Civil Procedure do not apply to a suit for arrears of rent under the Agra Tenancy Act, 1901, so as to admit of a joint suit being brought in respect of arrears of rent due in respect of several holdings. On the contrary, the Act contemplates that one suit should be brought in respect of each separate holding.

THE plaintiff in this case came into court claiming a sum of Rs. 549-14-0 as arrears of rent for the year 1310 Fasli in respect of 186 bighas 11 biswas. This, in the statement which he made in the Court of first instance, he represented to be a single holding under one lease. The Court, however, found that this was not so, but that the area in question consisted of various holdings which had come into the defendants' possession at different times upon separate engagements for payment of rent. Upon this finding the Court of first instance (Assistant Collector) dismissed the suit, holding that a single suit could not be brought for arrears due in respect of separate holdings. This decree was in appeal affirmed by the District Judge. The plaintiff thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

The respondents were not represented.

BANERJI and RICHARDS, JJ.—This appeal arises out of a suit for arrears of rent which has been dismissed by the Courts below. In his plaint the plaintiff claimed Rs. 549-14-0 as arrears of rent in respect of 186 bighas, 11 biswas, for the year 1310 Fasli. In the statement he made in the Court of first instance he alleged that the defendants held the whole of the land under a single lease. This allegation has been found to be untrue, and it has been found that the land in question consists of various holdings which have come into the defendants' possession at different times upon separate engagements for payment of rent. The Court of first instance upon this finding dismissed the suit on the ground that a

* Second Appeal No. 85 of 1905 from a decree of J. H. Campbell, Esq., District Judge of Aligarh, dated the 13th of October 1904, confirming a decree of Pandit Ram Prasad, Assistant Collector, 1st class, of Aligarh, dated the 4th of August 1904.

single suit cannot be brought for arrears due in respect of separate holdings. This decree having been affirmed by the lower appellate Court, the present appeal has been preferred. The first contention urged before us is that, having regard to the provisions of section 45 of the Code of Civil Procedure, a single suit was maintainable. We are unable to agree with the contention that that section is applicable to a suit like the present. Section 193 of the Tenancy Act provides that the provisions of the Code of Civil Procedure shall apply to the procedure in all suits and other proceedings under the Act "so far as they are not inconsistent therewith." We think it would be inconsistent with the provisions of the Tenancy Act to hold that section 45 of the Code of Civil Procedure would apply, and that a single suit can be brought for arrears of rent in respect of a number of separate holdings. Under section 57 of the Tenancy Act a tenant is liable to ejectment from his holding if a decree for arrears of rent in respect of that holding remains unsatisfied. If a joint suit for the rent of separate holdings were allowed to be brought, it would be difficult to give effect to the provisions of section 57. The whole tenour of the Tenancy Act shows that a separate suit should be brought for arrears of rent in respect of each holding. As observed by the Court of first instance, the object of the plaintiff in bringing a single suit appears to be that he might get a single decree and under that decree eject the defendants from their occupancy as well as non-occupancy holdings. This certainly is not what the law contemplates; but that would be the result if a single suit were to be brought for arrears of rent due in respect of separate holdings. We think the conclusion at which the Courts below have arrived is right.

It is next urged that the plaintiff should have been given the option of withdrawing a portion of his claim. This he did not ask for in the Courts below. On the contrary he appealed to the lower appellate Court on the ground that the defendants held under a single lease. Under these circumstances the Courts below were justified in dismissing the suit. We dismiss the appeal, but without costs, as the respondents are not represented.

Appeal dismissed.

1906
July 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

CHATTRAY (PLAINTIFF) *v.* NAWALA AND ANOTHER (DEFENDANTS).*

Lambardar and co-sharer—Powers of lambardar to deal with co-parcenary lands—Lease for seven years.

In the absence of a custom to the contrary a lambardar has no power without the consent of the co-sharers to grant a lease of co-parcenary land beyond such term as the circumstances of the particular year or season may require. *Jagannath* v. *Hardyal* (1) and *Bansidhar* v. *Dip Singh* (2) followed.

THE facts of this case are as follows. One Bishambhar Nath as lambardar of certain land belonging to Musammat Sundari granted a lease of the land with other land for seven years to the plaintiff, Chattray. Meanwhile Musammat Sundari sold her share to Nawala and Ballabh, who appear to have dispossessed Chattray and taken possession of the land purchased by them. Chattray accordingly sued for recovery of possession and for Rs. 100 as damages. The Court of first instance (Munsif of Muttra) gave the plaintiff a decree for possession and for Rs. 30 damages. On appeal, however, this decree was set aside by the lower appellate Court (Subordinate Judge of Agra) which held that the lambardar had no authority to grant a lease for seven years. The plaintiff appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Babu *Mohan Lal Sandal*, for the respondents.

STANLEY, C.J., and KNOX, J.—It has been distinctly ruled in this Court in two cases at least that a lambardar has no general power to grant a lease of co-parcenary land beyond such term as the circumstances of the particular year or season may require, in the absence of a custom to the contrary. In the case of *Jagannath* v. *Hardyal* (1) Edge, C. J., and Blair, J., in the course of their judgment observed:—"So far as we are aware, a lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or part of a season may require. In order to have the co-parcenary land cultivated, to obtain the benefit therefrom of the co-parcenary body, it is reasonable that the lambardar should have power,

* Second Appeal No. 984 of 1904 from a decree of Babu Rajnath Prasad, Subordinate Judge of Agra, dated the 14th of August 1904 reversing a decree of Munshi Maharaj Singh Mathur, Munsif of Muttra, dated the 8th of December 1903.

(1) Weekly Notes, 1897, p. 207. (2) (1897) I. L. R., 20 All., 433.

unless it is expressly withheld from him, to make a temporary letting of the co-parcenary land." In that case, no doubt, the lease was a lease in perpetuity, but the principle laid down applies to all leases made by lambardars. The same view was expressed by Burkitt, J., in the case of *Bansidhar* v. *Dip Singh* (1). The powers of a lambardar were shadowed forth in the third paragraph of clause 10 of Regulation No. VII of 1882. At the end of that paragraph, referring to the appointment of Sudder Malguzars, as lambardars were formerly termed, power is given to the Collector "either to make a joint settlement with the parties collectively (that is, with the co-parcenary body) or a majority of them, or with an agent appointed by them or a majority of them or to select one or more of them to undertake the management of the mehaul as Sudder Malguzars, due advertence being had to the wishes of all the co-parceners, and to the past custom of the village or villages comprised in the mehaul." The lambardar, from this it would appear, is to manage the co-parcenary property, and, in doing so to pay due regard to the wishes of all the co-parceners, as well as to the past custom of the village. It is only reasonable that such a manager should have power to make temporary lettings, but the duties imposed upon him do not seem to admit of his executing in favour of a lessee without the consent of the co-parcenary body a lease for a long term of years. No custom has been established in the present case in regard to the letting of the joint property, nor is there anything to show that the exigencies of the season or time when the impeached lease was granted required that the grant should be made for so long a term as seven years. We, therefore, uphold the decision of the Court below and dismiss the appeal with costs.

Appeal dismissed.

(1) (1897) I. L. R., 20 All., 438.

1906
July 11.

Before Mr. Justice Banerji.

GOPI NATH (DEFENDANT) v. MUNNO AND OTHERS (PLAINTIFFS).*

Easements—Right to unobstructed view of shop.

Held that no action will lie for the removal of erections in front of a shop merely on the ground that such erections obstruct the view which passers by formerly had of the shop *Smith* v *Owen* (1) and *Butt* v. *Imperial Gas Company* (2) followed

THE plaintiffs in this case were the owners of certain shops for the sale of grain, facing the north. The defendant owned certain shops close by facing the west. In front of the shops of both parties was an open space, and to the north of this a public road. The defendant put up in front of his shops a shed inclosed with sirki screens. The plaintiffs sued for the removal of this shed upon the ground that it obstructed the view of his shops from the public road and thereby diminished their value. The Court of first instance (City Munsif of Bareilly) decreed the plaintiff's claim for removal of the shed and screens erected by the defendant. On appeal the decision of the Munsif was substantially upheld, though the decree was to some extent modified by the Subordinate Judge. The defendant appealed to the High Court

Munshi *Gulzari Lal*, for the appellant.

Dr. *Satish Chandra Banerji* (for whom Babu *Balarom Chandra Mukerji*), for the respondents.

BANERJI, J.—The suit which has given rise to this appeal and the connected appeal No. 1011 of 1904 was brought by the plaintiffs respondents for the removal of a shed and sirki screens put up by the defendant appellant in front of his shops. The ground of the claim is that the shed and the screens obstruct the view of the plaintiffs' shops from the neighbouring road. The plaintiffs own certain shops for the sale of grain facing the north. Close by are the shops of the defendant facing the west. In front of the shops of both parties was an open space, to the north of which lies a public road. The defendant has put up the shed in question in front of his shops and has enclosed it with sirki screens. The only ground of the respondents' claim is, as I have

* Second Appeal No. 1010 of 1904 from a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 2nd of July 1904, modifying a decree of Babu Banke Bihari Lal, Munsif of Bareilly, dated the 24th of September 1903.

(1) (1866) 35 L. J., Ch., 317. (2) (1866) L. R., 2 Ch., 158.

said above, that these constructions obstruct the view of their shops from the road. The Court below has decreed the claim. It is contended in this appeal that a suit like this is not maintainable. In my judgment the contention is well founded. It is now settled law that no action will lie for the obstruction of the prospect of a house. There is no question in this case of obstruction to or diminution of light and air. The only right claimed is that the plaintiffs are entitled to undisturbed prospect of their shop from the road. In *Smith* v. *Owen* (1) it was held that the Court will not restrain the erection of buildings which merely prevent goods displayed in a shop from being seen from places whence they would previously have been seen. In *Butt* v. *Imperial Gas Company* (2), it was held that the erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business. The law on the subject is clearly stated in Goddard on Easements, sixth edition, pages 116 to 118. The principle laid down in the English cases referred to above equally applies to cases arising in this country. It is admitted that access to the plaintiffs' shops has not been obstructed. All that is complained of is the interruption to the view of the shops from the neighbouring road. This would not entitle the plaintiffs to have the constructions removed. It is said that by reason of these constructions the letting value of the plaintiffs' shops has been diminished. If that is so, the plaintiffs may have a remedy in damages. But as no damages were claimed in this case, that question need not be considered and determined. As the ground upon which the plaintiffs ask for a decree for removal of the shed and screens is untenable, the suit must fail. I accordingly allow the appeal, set aside the decrees of the Courts below, and dismiss the plaintiffs' suit with costs in all Courts.

Appeal decreed.

(1) (1866) 35 L. J., Ch., 317. (2) (1866) L. R., 2 Ch., 158.

1906
July 12

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR v. BUDHAN.*

Criminal Procedure Code, section 339—Pardon—Pardon to accused who has had an opportunity of cross-examining the witnesses for the prosecution—Withdrawal of pardon and subsequent commitment.

Where a pardon was tendered by a Magistrate to an accused person after he had had an opportunity as an accused person of cross-examining the witnesses for the prosecution, and on it appearing that he had not made a full and true disclosure of the facts of the case such pardon was withdrawn and he was committed along with his co-accused to the Court of Session: *Held* that the commitment was not open to objection. *Queen-Empress* v. *Brij Narain Man* (1) followed.

In this case the Joint Magistrate of Meerut enquired into a charge of murder against two persons—Ram Karan and Budhan, after all the evidence for the prosecution was recorded, tendered a pardon to Budhan on condition of his making a full and true disclosure of the facts of the case. Budhan accepted the pardon, but immediately afterwards stated that he knew nothing about the case. Thereupon the Magistrate withdrew the pardon and committed Budhan to the Court of Session along with his co-accused Ram Karan. The Sessions Judge referred the case to the High Court, being of opinion, with reference to the cases of *Queen-Empress* v. *Sudra* (2), *Queen-Empress* v. *Bhoma Tewari* (3) and *Queen* v. *Petumber Dhoober* (4) that the commitment was illegal.

The Officiating Government Advocate (Mr. W. W. *Burkitt*) in support of the order.

BANERJI and AIKMAN, JJ.—After examining the record and perusing the referring order of the learned Sessions Judge, we find no ground for quashing the commitment. The learned Sessions Judge has overlooked the fact that the ruling of this Court in *Queen-Empress* v. *Sudra* (2), on which he relies, was expressly dissented from in the case of *Queen-Empress* v. *Brij Narain Man* (1). In the particular case under consideration, Budhan was an accused person from the very first. All the evidence for the prosecution was taken in his presence and he had an opportunity of cross-examining the witnesses. When that evidence had been recorded, the Magistrate, for the reasons set

* Criminal Reference No. 322 of 1906.

(1) (1898) I. L. R., 20 All., 520.
(2) (1891) I. L. R., 14 All., 339.
(3) (1892) I. L. R., 15 Mad., 352.
(4) (1870) 14 W. R., Cr. R., 10.

forth in his order of the 10th of April 1906, deemed it necessary to offer a pardon to Budhan on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence under inquiry. Budhan accepted that pardon, but immediately afterwards refused to make a statement, saying that he knew nothing. The Magistrate accordingly revoked the pardon and proceeded with the inquiry; with the result that the accused, including Budhan, were committed to the Court of Session. In our opinion there was no illegality in the Magistrate's procedure. The learned Judge will go on with the trial.

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EMPEROR v. BUDHAN.

APPELLATE CRIMINAL.

1906
July 14.

Before Sir John Stanley, Knight, Chief Justice.

EMPEROR v. AMRIT LAL *

Act No. XLV of 1860 (Indian Penal Code), sections 62, 409—Criminal breach of trust—Sentence.

Held that the special sentence provided for by section 62 of the Indian Penal Code is a sentence which should only be inflicted in rare cases—those in which crimes of an atrocious nature are exposed or in which offences have been committed under aggravated circumstances. *Queen v. Mahomed Akbar* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *M. L. Agarwala*, for the appellant.

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown.

STANLEY, C.J.—The learned counsel for the applicant has only addressed me on the subject of sentence. The appellant was found guilty of the offence of embezzlement and sentenced to a term of eight years' rigorous imprisonment and a fine of Rs. 2,500, or in default two years' further rigorous imprisonment. It was also adjudged that the rents and profits of his property during the period of his imprisonment should be forfeited to Government, subject to such provision for his family and dependents as the

* Criminal Appeal No. 515 of 1906.

(1) (1869) 12 W. R., Cr. R., 17.

Government may think fit to allow. The offence of which the accused has been found guilty is no doubt a most serious one. Whilst in Government employment as a clerk in connection with the Botanical Gardens at Saharanpur he was guilty of embezzlement and found to have appropriated sums amounting to Rs. 664 in the year 1905. The learned Sessions Judge was no doubt right in considering that systematic embezzlement of the kind by persons in Government service must be regarded as a very serious offence and that exemplary punishment was necessary. It appears to me, however, that the punishment inflicted in this case is out of all proportion to the gravity of the offence. In the first place I may say that the forfeiture of the rents and profits of the appellant which is permitted by section 62 of the Indian Penal Code is a punishment which should only be imposed in rare cases—those cases in which crimes of an atrocious nature are exposed or in which offences have been committed under aggravated circumstances. This case of embezzlement does not appear to me to be a case which was contemplated when section 62 was formulated. I find that this was the view taken by Jackson and Markby, JJ., in the case of *Queen* v. *Mahomed Akbar* (1). The imposition of a fine of Rs. 2,500 is also a heavy punishment, taken in conjunction with the term of eight years' rigorous imprisonment, which has also been imposed. Whilst upholding, therefore, the conviction, I set aside the sentence and in lieu thereof I direct that the appellant do suffer rigorous imprisonment for a term of five years and do pay a fine of Rs. 1,000, or in default a further period of two years' rigorous imprisonment. As regards the order passed under section 62, that must necessarily fall, inasmuch as the appellant has not been sentenced to a term of imprisonment of seven years and upwards. It is therefore set aside. The imprisonment will date from the 20th of April 1906.

(1) (1869) 12 W. R., Cr., R., 17.

APPELLATE CIVIL.

1906
July 18

Before Mr Justice Sir George Knox and Mr. Justice Aikman.

RAM DAS (DEFENDANT) v. BADRI NARAIN AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 539—Applicability of section—Suit brought by the whole body of persons authorized to administer the trust.

Held that section 539 of the Code of Civil Procedure does not apply to a case where the suit is instituted by the whole body of persons who are legally authorized to administer the trust to which it relates. *Bai Budree Das Mukim Bahadur* v. *Chum Lal Johury* (1) followed.

THE facts of this case are as follows:—

By his will dated the 20th of February 1896 one Bisheshar Prasad, amongst other dispositions of his property set apart 14 annas 14 gandas in mauza Halka and half of a grove in Brijraj Katra for the establishment of a patshala in the grove in question, the appointment of a teacher and the maintenance of poor pupils. In order to give effect to this endowment the testator appointed his son-in-law Ram Das as manager of the trust property, and five persons by name as supervisors. The survivors of these five were authorized in the case of the death or retirement from the duties of the trust of any of the five to appoint others in their places. The will also provided that the supervisors (or trustees) should have power in case of mismanagement or breach of trust by Ram Das to remove him and appoint another manager in his place.

The present suit was brought by three of the original supervisors and two subsequently co-opted supervisors, *i.e.*, by the whole body of persons entitled to administer the trust, for the removal of Ram Das from the post of manager, the delivery of papers relating to the trust property and the rendering of accounts. The Court of first instance (Subordinate Judge of Mirzapur) dismissed the suit, holding that it was barred by the provisions of section 539 of the Code of Civil Procedure. On appeal the District Judge reversed the decision of the first Court and remanded the case under section 562 of the Code. From this order the defendant (Ram Das) appealed to the High Court.

* First Appeal No. 33 of 1906 from an order of Syed Muhammad Ali, District Judge of Mirzapur, dated the 1st of February 1906.

(1) (1906) 10 C. W. N., 681.

1906

RAM DAS v. BADRI NARAIN.

Dr. *Satish Chandra Banerji*, for the appellant.

Dr. *Tej Bahadur Sapru*, for the respondents.

KNOX and AIKMAN, JJ.—This first appeal arises out of a suit instituted by the whole body of overseers appointed under the will of one Bisheshar Prasad and entrusted with the supervision of an endowment. They set forth in the plaint that under the terms of the will they removed the appellant from his position as manager of the trust property, and that as he refused to vacate, to give up the papers relating to the property and to render accounts. The Court of first instance, holding that the plaintiffs could not sue until they had first obtained the consent in writing of the officer authorized under section 539 of the Code of Civil Procedure, dismissed the suit. The lower appellate Court on appeal reversed the decree of the Court of first instance and remanded the case under section 562 of the Code. From that order of remand the present appeal has been filed, and it is contended that the decision of the Court of first instance was right and that the suit was not maintainable without the consent referred to above. We have heard the learned vakil who appears in support of the appeal. In our opinion the view taken by the Court below was the right view. As pointed out by Woodroffe, J., in *Rai Budree Das Mukim Bahadur* v. *Chuni Lal Johurry* (1), section 539 "does not take away or affect existing substantive rights unless it says so. Secondly the section does not say so. To support the contrary contention it would have to be read as if the words 'but no other person or persons' were inserted between the words 'Advocate General' and 'may institute,' that is, that no person but the Advocate General, or a public officer, or two or more persons with their consent can sue in the case of an alleged breach of trust or where directions for administration are necessary for the relief mentioned in the section." In this case the suit has been instituted by the whole body of persons authorized by the will to take action. It is not a suit merely by two or more persons having interest in the trust. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1906) 10 C. W. N., 581.

PRIVY COUNCIL.

P. C. 1906 July 27.

SHAH ARA BEGAM AND OTHERS (DEFENDANTS) v. NANHI BEGAM *alias* ROSHAN BEGAM (PLAINTIFF) AND ANOTHER (DEFENDANT)

[On appeal from the Court of the Judicial Commissioners of Oudh, Lucknow.]

Evidence—Proof of date of birth—Minority—Plaintiff having three years to sue after attaining majority—Act No. XV of 1877 (Indian Limitation Act), section 7—Nature of evidence required to prove date of birth

Although in India it is difficult to prove such a fact as the date of birth after a lapse of many years, and it would be unreasonable to require such a class of evidence as would be justly demanded in a similar case in England, the evidence must yet be such as to carry reasonable conviction to the mind.

In this case on the proof of the date of the plaintiff's birth depended the question of whether or not the suit was brought within three years of her attaining majority, and it was held that the evidence was insufficient to prove the true date of her birth, and that therefore the suit was barred by limitation.

APPEAL from a decree (28th September, 1900) of the Court of the Judicial Commissioners of Oudh which reversed a decree (18th October 1898) of the Subordinate Judge of Lucknow by which the first respondent's suit was dismissed.

The suit was brought on 29th August 1896 by the first respondent, one of the daughters of Mir Wajid Ali, to recover her share in her father's estate. The only question on the appeal was whether the suit was barred by limitation under Act XV of 1877; and the decision of that question depended on the finding whether or not the suit was instituted within three years of the plaintiff's attaining majority.

On this point the Courts in India differed, the Subordinate Judge finding on the evidence that the plaintiff was born at the end of the year 1871, and therefore attained her majority (21 years) at the end of 1892, more than three years before suit. He therefore dismissed the suit.

On appeal the Court of the Judicial Commissioners (MR. ROSS SCOTT, Judicial Commissioner, and MR. G. T. STANKIE, additional Judicial Commissioner) held the balance of the evidence was in favour of the plaintiff and that it was proved that she was born on 22nd December 1873, and therefore attained majority in 1894, or within three years of the institution of her suit.

Present:—Lord MACNAGHTEN, Lord ATKINSON, SIR ARTHUR WILSON and SIR ALFRED WILLS.

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The decree of the Court was consequently in favour of the plaintiff.

On this appeal

DeGruyther, for the appellants.

C. W. Arathoon, for the respondent No. 1.

1906, *November* 1*st*.—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

This appeal raises a single question of fact, upon which the Courts in India have differed. The suit was brought on the 29th August 1896, and the object of the suit was to recover the share to which the plaintiff (the first respondent) claimed to be entitled in the estate of her father Darogha Mir Wajid Ali, a Muhammadan of the Shiah sect. Her title was disputed upon many grounds not now in question. The only controversy left is as to whether the suit was barred by limitation. It was undoubtedly barred unless the plaintiff is entitled to the extension of time allowed by section 7 of the Indian Limitation Act 1877. The plaintiff during her minority was under the guardianship of her mother, whereby the period of minority was extended to 21 years; and the section just referred to gave her three years from the date at which she attained her full age, within which to bring her suit. The question therefore is whether she has shown by sufficiently trustworthy evidence that she came of age within three years before commencing her suit. And that is the question on which the Courts in India differed.

There are a few facts, and some dates, about which there is no doubt. The plaintiff's mother Moghal Jan lived for some years under mutah marriage with Daregha, but on the 11th September 1874 he married her by nikah. Before the latter date she bore him a number of children, of whom some are said to have died in infancy, whilst three, a son and two daughters, survived, the plaintiff being the youngest of the three. Daregha died on the 14th December 1876.

On the 21st of June 1871 Daregha executed a codicil to his will, by which he showed that he had already made provision in the will for the son of Moghal Jan, Amir Hasan by name, and now made provision for Munni Begam, the elder of the two daughters; and the will is framed in terms which have

been rightly held to show that at that time the plaintiff was not yet born.

On the 29th May 1875 Darogha made another will, in which he made provision for the plaintiff, as well as for her brother and sister. Thus it is clear that the birth of the plaintiff took place between the 21st June 1871 and the 29th May 1875. But, unfortunately, that is almost the only thing that is clear. The plaintiff's case, as stated in paragraph 7 of her plaint, was that she attained her age of 21 years on the 1st January 1894, which would make the date of her birth to be the 1st January 1873, and that is the date of birth sworn to by all her witnesses.

Her witnesses were three in number, her mother Moghal Jan, her brother of the whole blood Amir Hasan, and her half-brother Tasadduk Hasan, a son of Moghal Jan by a previous husband. The mother said that the plaintiff was in her 26th year at the date when she gave her evidence. She said that the plaintiff was born on the first of the month Zikad; she added:—"On the 1st Zikad of every year I tie a knot in a thread to celebrate her birthday . . . I have already tied 25 knots in that thread."

In cross-examination, she said that at the date of the nikah the plaintiff was in her second year, but almost immediately afterwards she said that at that date the plaintiff "was in the fourth year, a month less, it may be; three knots had already been tied." The examination of this witness was taken before a Commissioner, and it appears that an interval of several hours occurred before her re-examination, and then she sought to explain the contradiction in her previous evidence by saying:—"When my nikah took place she was in her second year and she was about four at the time of Darogha Wajid Ali's death." Amir Hasan declared that at the time he was speaking the plaintiff was aged 25 years and 5 months. He followed his mother in saying that the last knot tied on the plaintiff's thread was the 25th, and in saying that the plaintiff was about four years old at the death of their father. He further confirmed his mother in saying that a thread with knots was kept to show his own age, similar to that of his sister. Tasadduk repeated the story about the practice of tying knots, and also said the plaintiff was about two years' old at the time of the nikah. That is the whole of the plaintiff's evidence,

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Their Lordships fully recognise that in India it is difficult to prove such facts as the date of birth, after a lapse of many years, and that it would be unreasonable to require such a class of evidence as would justly be demanded in this country. But the evidence must be such as to carry reasonable conviction to the mind. The evidence for the plaintiff is not only extremely scanty in amount but extremely unsatisfactory in character. Moghal Jan directly contradicted herself as to the age of the plaintiff at the date of the nikah. The story about the knots on the thread, indicating the plaintiff's age, broke down, because both mother and son said the knots tied were 25 in number, whereas if the birth took place at the time alleged, they ought to have been 26. A like story was told about the knots on Amir Hasan's thread indicating his present age. That story is entirely inconsistent with the statement of his age in his petition for cancellation of the certificate of guardianship dated the 1st and 2nd November 1887.

The case on the other side was, that the plaintiff was born in the latter end of 1871. In support of that case there were also three witnesses called, of whom it is enough to say that their evidence is as unsatisfactory as that of the plaintiff's witnesses.

The Subordinate Judge who tried the case came to the conclusion that the plaintiff had failed to prove her story as to the date of her birth. He further thought that it was shown that the birth took place at the end of 1871, and he dismissed the suit. The Court of the Judicial Commissioner on appeal reversed that decision, and thought that on the evidence the plaintiff's suit was shown to be in time. But the Court came to that conclusion by adopting a suggestion, apparently made for the first time in that Court, that confusion had been made between the 1st Zikad 1288, corresponding to the 1st January 1873, and the first Zikad of the next Muhammadan year, 1289, corresponding to a later date in the same English year 1873.

This point is purely one of fact, and there is no evidence to support it. If it had been put forward by the witnesses, and they had said that they had been thus misled, it might have carried weight; on the other hand it might have been displaced by cross-examination. It appears to their Lordships very difficult to

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adopt such a conclusion in a Court of appeal, merely on the suggestion of the legal gentlemen representing one of the parties. The Court of the Judicial Commissioner further considered that some of the witnesses for the defence tended to support the plaintiff's case, but it appears to their Lordships that that evidence is too vague and unsatisfactory to lend material support to either case. Their Lordships agree with the Subordinate Judge, to the extent of holding that the plaintiff has failed to prove that she attained her full age within three years before the commencement of the suit.

Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner's Court should be discharged with costs. The first respondent will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant—*Watkins & Lempriere.*

Solicitors for the respondent No. 1—*T. L. Wilson & Co.*

J. V. W.

GHANSHIAM LALJI (DEFENDANT) *v.* RAM NARAIN (PLAINTIFF)

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

P. C. 1906 *August* 1. *November* 1

Interest—Rate of interest—Hundis silent as to interest—Collateral contemporaneous agreement fixing rate—Act XXVIII of 1855 *(Usury Laws Repeal Act)—Act No XXVI of* 1881, *(Negotiable Instruments Act) section* 80.

In a suit on certain *hundis* which were silent as to interest, but as to which there was a collateral written agreement that they should bear interest at 30 per cent per annum, it was found that this mode of dealing with interest by a collateral agreement and not on the face of the *hundis* was in accordance with the custom prevailing in the district, and among the class affected by the suit.

Held that by Act XXVIII of 1855 interest was recoverable at the rate agreed upon by the parties, and section 80 of the Negotiable Instruments' Act (XXVI of 1881) was not applicable.

That section purports to confer a right to interest, not to take away such a right otherwise existing, nor to deprive a plaintiff of a right to interest which he has acquired by contract.

APPEAL from a decree (19th January 1903) of the High Court at Allahabad which affirmed a decree (8th June 1900) of

Present:—Lord MACNAGHTEN, Sir ARTHUR WILSON and Sir ALFRED WILLS.

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the Court of the Subordinate Judge of Agra in favour of the respondent (plaintiff).

The suit was brought against the appellant to recover Rs. 5,600 as principal and Rs. 4,965-12 as interest at 30 per cent. per annum alleged to be due on six *hundis*. No rate of interest was mentioned in the *hundis*, but the plaint stated that at the time of their execution the defendant agreed on default in payment of principal to pay interest at the rate of 30 per cent. per annum, but that according to the custom of the country the rate of interest was not entered in the *hundis*.

The defendant denied the alleged agreement, but both the Subordinate Judge and the High Court found in favour of the plaintiff on that point, and gave the plaintiff a decree in accordance with that agreement, holding that it was admissible in evidence under section 92 of the Evidence Act (I of 1872).

The judgment of the High Court (Sir JOHN STANLEY, C. J. and Mr. JUSTICE BURKITT) appealed from was as follows:—

"The suit out of which this appeal has arisen was brought by the plaintiff to recover the amount due to him on foot of six *hundis* for sums amounting in the aggregate to Rs 5,600 drawn by the defendant on himself in favour of the plaintiff. The plaintiff in his plaint claimed interest upon the *hundis* at the rate of Rs. 2-8-0 per cent. per mensem, *viz.*, 30 per cent. per annum, the total amount claimed being Rs. 10,565-12-0. This appeal has been preferred by the defendant from the decision of the lower court, which decreed the plaintiff's claim on the ground that having regard to the provisions of section 80 of the Negotiable Instruments Act interest could only be recovered at the rate of 6 per cent. per annum, there being no rate of interest specified in the *hundis*. This section provides that 'when no rate of interest is specified in an instrument, interest on the amount due shall, except in cases provided for by the Code of Civil Procedure, section 532, be calculated at the rate of 6 per cent. per annum.' It was alleged in the plaint, and not denied by the defendant, that the rate of interest was not specified in the *hundis* in accordance with a custom prevailing in the district in which the *hundis* in this case were drawn, and evidence was adduced and was accepted by the Subordinate

Judge as satisfactory, that by a collateral agreement entered into at the time the *hundis* were drawn, it was agreed that interest should be paid at the rate of 30 per cent. per annum. The question which has been argued before us, on behalf of the appellant, is that, having regard to the provisions of the section of the Negotiable Instruments Act to which we have referred, interest was not chargeable at any rate other than six per cent. per annum. It appears to us to be clear that under *proviso* (2) of section 92 of the Evidence Act, evidence was admissible to prove the existence of a separate oral agreement as to interest, the documents being silent as to interest. This in fact was so decided in the case of *Sowdamonee Debya* v. *Spalding* (1). It is said, however, that section 80 of the Negotiable Instruments Act precludes the court from granting a higher rate of interest than 6 per cent., notwithstanding that an agreement was entered into for the payment of such higher interest. We are unable to take this view of the law. We think that section 80 must be interpreted as applying to cases in which the rate of interest is not specified in an instrument and there is no collateral contract regulating the rate of interest. In this case there was proved by clear evidence a collateral agreement for the payment of interest at the higher rate. We are of opinion therefore that this section has no operation. We accordingly think that there is no substance in the only point which has been argued before us in this appeal and that the appeal must fail. We therefore dismiss it with costs."

On this appeal, which was heard *ex parte*,

A. M. Dunne for the appellant contended that a higher rate of interest than 6 per cent. was precluded by section 80 of the Negotiable Instruments Act (XXVI of 1881) no rate of interest having been specified in the *hundis* in accordance with a custom which was not disputed. The interpretation put on the section by the Courts below really added a clause to it which it did not contain, namely "unless there is a contract to the contrary." It was submitted that the agreement alleged in this case was not admissible under section 92 of the Evidence Act. The case cited by the High Court was not applicable, it having been decided

(1) (1882) 12 C. L. R., 123.

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before the Negotiable Instruments Act was passed. Reference was also made to sections 1 and 79 of the Negotiable Instruments Act and to the Interest Act (XXXII of 1839).

1906, *November* 1st.—The judgment of their Lordships was delivered by Sir ARTHUR WILSON:—

The suit out of which this appeal arises was brought upon six *hundis* drawn by the defendant (appellant) upon himself in favour of the plaintiff (respondent). The hundis were silent as to interest; but there was a collateral agreement, embodied in written documents, that the *hundis* should bear interest at a rate equivalent to 30 per cent. per annum. And it has been held that the dealing with interest by a collateral agreement, and not on the face of the *hundis*, was in accordance with the custom prevailing in the district, and amongst the class, affected by this suit.

The contention of the appellant was that, notwithstanding the agreement of the parties, the respondent's right to interest was restricted to 6 per cent. by reason of the Negotiable Instruments Act, XXVI of 1881. Both the Courts in India rejected this contention, and, their Lordships think, rightly.

The section says:—

"When no rate of interest is specified in the instrument, interest on the amount due thereon shall, except in cases provided for by the Code of Civil Procedure, section 532, be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs."

"*Explanation*:—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour."

In 1855, by Act XXVIII of that year, the usury laws previously in force were repealed, and the general rule was laid down that "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." Section 80 of the Negotiable Instruments Act does not purport to deprive those dealing with such instruments of the freedom of contract previously enjoyed by other contracting parties. It purports to confer a right to interest, not to take away such a right otherwise existing. When a plaintiff has to rely upon the section as the ground of his claim to interest,

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no doubt the terms of the section must be followed. But to read the section as depriving him of a contractual right of interest would be to read into it something which it does not say, and which cannot reasonably be implied from its language.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent not having appeared, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant—*Morgan, Price, & Mewburn.*

J. V. W.

APPELLATE CIVIL.

1906, *July* 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

AWADH SARJU PRASAD SINGH (PLAINTIFF) *v* SITA RAM SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Partition—Partition deed giving certain advantages to minor member of family—Right of person so benefited to sue on deed—Act No. I of 1877 (Specific Relief Act), section 23(c).

By a deed of partition executed by the adult members of a joint Hindu family it was agreed that a certain minor member of the family, represented in the execution of the deed by his father, should receive a certain share in a particular village "by right of primogeniture," and the agreement further recited that the member in question had been put into possession of the share allotted to him. It was further agreed that, inasmuch as the property thus dealt with was subject to two mortgages, the other members of the family would be responsible for the payment of the mortgage debts and would indemnify the recipient of the mortgaged property in case of proceedings being taken against such property for satisfaction of the mortgage debts.

Held, on suit by the minor (after attaining majority) to compel reimbursement by the other members of the family, that the partition deed was enforceable in favour of the plaintiff, just as much as, if just and equitable, it would have been binding upon him, and that the plaintiff was entitled to sue for any benefit which the deed purported to secure to him. *Annamah Chetty* v. *Murugasa Chetty* (1) and *Gandy* v. *Gandy* (2) referred to.

Held also, on a construction of the partition deed that the plaintiff was also entitled to sue having regard to the terms of section 23 (*c*) of the Specific Relief Act, 1877.

* Second Appeal No. 371 of 1905, from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 27th of January 1905, reversing a decree of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 12th of September 1904.

(1) (1903) L. R., 30 I. A., 220. (2) (1885) L. R., 30 Ch. D., 57.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Munshi *Gobind Prasad* and Babu *Durga Charan Banerji*, for the respondents.

STANLEY, C. J., and KNOX, J.—This is an appeal against a decree of the District Judge of Ghazipur, reversing the decision of the Court of first instance and dismissing the plaintiff's claim, and arises under the following circumstances. The plaintiff is a great-grandson of one Baij Nath Singh who died a number of years ago possessed of considerable property. He had two sons, namely, Ram Narain Singh and the defendant Ram Prasad Singh. The parties to the suit are his descendants. Before the execution of the agreement of the 27th of March 1888, to which we shall presently refer, the members of the family of Baij Nath Singh were undivided and joint, but owing to dissensions amongst them it was determined to have a partition of the joint family property. Accordingly an agreement was entered into, of date the 27th of March 1888, between the adult members of the two branches, namely, Ram Prasad Singh and his sons Ajudhia Prasad Singh and Sita Ram Singh, of the one part, and Ram Pargash Singh and Dwarka Prasad Singh, the sons of Ram Narain Singh, who was then dead, of the other part. It is recited in this agreement that the parties were equal sharers in a number of villages, the names of which are given, but that in certain other villages the names of the parties were entered in the jamabandis in respect of the zamindari and cultivatory rights, "contrary to facts and the shares entered in the pattidari khewat." It was then agreed between the parties that they should give the whole of an 8 anna 5 pie 15 kant 5 jau 41¼ til share in a village, named Gauritar, as also an 8 kant 4 jau 6 til share in the same village, which had formerly belonged to one Tilhar Rai, to the plaintiff Awadh Sarju Prasad Singh, and it is recited that this agreement was carried out and that the plaintiff was put in possession of the same. In the document it is stated that this village was given to him "by right of paitrik[illegible]ture." He is the eldest son of Ram Pargash Singh, son of Ram Narain Singh, who was the eldest son of Baij Nath Singh. Then follows a recital that the share in this village jointly with two

other villages had been hypothecated to Dayal Pande and Sheolojak Pande under two hypothecation bonds, one executed by the first parties to the agreement and the other by the second parties respectively on the 24th of November 1884, and that the executants were liable to pay the amount of their respective bonds. Then follows a provision that "this property (that is, the village of Gauritar) shall be considered free from the said debt as well as every sort of debt due by us (that is, the executants). If the said property be jeopardised on account of the said amount due under the hypothecation bonds executed either by the first or the second parties, Babu Awadh Sarju Prasad Singh aforesaid or his guardian will have power to recover the money from the person and property of that party in a proper way to the extent of the injury done, *i.e.*, the party on account of whose debt secured by the bond executed by him the property in the said Gauritar shall be jeopardised will be liable to pay Rs. 1,250. If the property be jeopardised on account of the amount due under the bonds executed by each of the parties, each of them will be liable to pay Rs. 1,250." The remaining villages were then divided between the two parties to the agreement in equal shares. No reference is made to any disputes between the parties in regard to the joint properties in the earlier part of this agreement, but from a passage which occurs at the end of it we gather that there were disputes pending. The passage is as follows:—"Now there remains no sort of dispute between the parties. The settlement has been made after understanding the account up to 1295 Fasli." The executants of the agreement failed to pay the mortgage debts due to Dayal Pande and Sheolojak Pande, and in consequence two suits were instituted by the mortgagees to enforce payment of the mortgaged debts by sale of the mortgaged property, and the shares in Gauritar which had been settled upon the plaintiff were sold by auction on the 28th of November 1898. Of the defendants' share in that village a 4 anna share had been mortgaged by them to the mortgagees. This left a 3 pie 2 kant and 23$\frac{3}{4}$ til share unincumbered. The plaintiff instituted the present suit against the defendants to recover the loss which he had sustained by reason of the sale of the 4 anna share.

The Court of first instance decreed the claim, holding that the agreement forming the basis of the suit was a family arrangement and was binding upon all the members of the family.

The learned Subordinate Judge further held that the agreement fell within the purview of the last portion of clause (*c*) of section 23 of the Specific Relief Act, and that according to it the plaintiff, although not a party to the agreement, being beneficially entitled under it, was entitled to sue under that section. Upon appeal the learned District Judge held that the agreement was not "a compromise of doubtful rights," and therefore did not come within the meaning of that section, and that he was therefore "bound to hold that plaintiff has no right to sue." He accordingly dismissed the plaintiff's claim. It appears to us that the decision of the learned District Judge is erroneous, and for these reasons. The agreement of the 27th of March 1888 was not so much a compromise of doubtful rights between members of a family as an agreement entered into by the adult members of a joint Hindu family for the partition of the joint family property. It is settled law that a partition so made during the minority of members of a joint family will be valid, and if just and reasonable will bind the minor members of the family. Of course the interests of minors must be regarded. A minor on attaining full age may sue to have a partition set aside on the ground that the same was fraudulent or prejudicial to his interests. But if the partition be just and equitable it will be binding on him. In this case the plaintiff was represented in the transaction by his father and natural guardian Ram Pargash Singh, and the partition has been acted upon and the property the subject of it, except the village Gauritar, enjoyed in accordance with the rights of the parties as declared in the agreement. Now if a partition so effected is binding upon a minor, it seems to follow that the minor must have the correlative right of enforcing his claims under the partition. The plaintiff was, it seems to us, somewhat in the position of a *cestui que trust* for whom, in satisfaction of his interest in the joint family property, provision was made by the partition.

The rule of the common law that a person who is not a party to a contract cannot bring a suit on foot if it is not universal, as was pointed out by our brothers Blair and Banerji in their order of

remand of the 4th of May 1904. In that order several exceptions to the rule are referred to. At the date of the execution of the agreement in question the position of the parties was this:—The parties to the agreement were the adult and managing members of the two branches of the joint family, one of them, the father of the plaintiff, being his natural guardian. As a member of the family the plaintiff was beneficially entitled to his share in the joint family property. In the recent case of *Annamalı Chetty* v. *Murugasa Chetty* (1) their Lordships of the Privy Council defined the position of the manager of a joint family in regard to a member of that family as follows:—" Such a person is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such person is not that of principal or agent, or of partners, it is much more like that of trustee and *cestui que trust*." In this view the relation existing between the plaintiff and the manager or managers who were parties to the partition would be akin to that of *cestui que trust* and trustee. The case of *Gandy* v. *Gandy* (2) is instructive. The facts of that case were as follows. By a deed of separation between husband and wife, the husband covenanted with trustees to pay them an annuity for the use of the wife and two elder daughters and also the expenses of the maintenance and education of two younger daughters upon certain conditions. On one of the younger daughters attaining the age of 16 the husband refused any longer to maintain her; whereupon she brought an action by her next friend against the husband and the trustees of the separation deed to enforce the husband's covenant. The trustees refused to be joined as plaintiffs. Bacon, V.C., gave a judgment for enforcing the covenant, but upon appeal it was held that upon the construction of the deed the plaintiff was not in the position of *cestui que trust* under the covenant so as to entitle her to maintain the action, but liberty was given to her to amend the writ by adding the trustees, the wife and the other daughters, or any of them, as plaintiffs. The trustees refused to join as co-plaintiffs and the statement of claim was amended by making the wife a co-plaintiff. It was held that the wife had

(1) (1903) L. R., 30 I. A., 220. (2) (1885) L. R., 30 Ch. D., 57.

such an interest as entitled her to sue in equity for the enforcement of the covenant. In the course of his judgment Cotton, L. J., observed as follows :—"Now of course as a general rule a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of, or does not perform the obligations of, that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception : if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say that he has a beneficial right as *cestui que trust* under that contract, then B would in a Court of Equity be allowed to insist upon and enforce the contract." Later on he said :—"I think what we have to consider is this—whether these two trustees, who are defendants, did enter into this contract so as to give to these infant children a beneficial right to the consequences of the covenant being performed." He held that that was not so, that the deed was a separation deed and that the parties whose rights had to be provided for were the husband and wife. Bowen, L. J., observed that "whatever may have been the common law doctrine, if the true intent and the true effect of this deed was to give to the children a beneficial right under it, that is to say to give them a right to have these covenants performed and to call upon the trustees to protect their rights and interest under it, then the children would be outside the common law doctrine and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine of course depends upon its being made out that, upon the true construction of this deed, it was a deed which gave the children such a beneficial right." It was ultimately held in that case that the wife had such an interest as entitled her to sue, the deed being an agreement between her and her husband, and the trustees being introduced on her behalf in order to get over the difficulty that the husband and the wife could not at law sue each other, so that the trustees were to be considered trustees for the wife, and if they refused to sue, she could sue in equity. Now in that case the daughter was not in the position of a *cestui que trust* under the covenant, but the wife was in that position. Therefore it

was held that the wife could sue upon the covenant. In the case before us the true intent and meaning of the deed of agreement of the 27th of March 1888 was, we think, to give to the plaintiff a beneficial right under it, that is, a right to have the enjoyment of the village which was allotted to him free from incumbrance, or in the alternative in lieu of the village to obtain payment of the sums covenanted to be paid. For these reasons we think that the suit was maintainable and that the decree of the lower appellate Court cannot be supported.

We may add that if the agreement was not enforceable by the plaintiff as a binding agreement entered into by the adult members of a joint family for the partition of the joint family property, it would, we are disposed to think, be enforceable under the provisions of section 23 of the Specific Relief Act as being a compromise of doubtful rights between members of the same family under which the plaintiff was beneficially entitled. It is evident that there were disputes between the members of the family in regard to the family property, and apparently a claim was set up by his father on behalf of the plaintiff to *jethani* rights, for we find in the agreement that the village in question was given to him by reason of his right of primogeniture. That there were disputes is apparent from the passage towards the end of the agreement to which we have already referred, namely, that there remained no sort of dispute between the parties and that the settlement had been made after understanding the account up to 1295 Fasli.

We therefore allow the appeal, set aside the decree of the lower appellate Court, and, inasmuch as that Court decided the appeal upon a preliminary point and we have overruled the decision upon that point, we remand the case under the provisions of section 562 of the Code of Civil Procedure to the lower appellate Court with directions that it be reinstated on the file of pending appeals in its original number and be disposed of on the merits. The appellant will have the costs of this appeal. All other costs will abide the event.

[*Cf.* also *Sarabjit Partap Bahadur Sahi* v. *Indarjit Partap Bahadur Sahi* (1).—Ed.]

Appeal decreed and Cause remanded.

(1) (1904), I. L. R., 27 All., 203; at p. 249.

1906
July 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

BALBHADDAR PANDE (DEFENDANT) *v.* BASDEO PANDE (PLAINTIFF)*

Suit for damages for false imprisonment—Cause of action—Defendant not the actual prosecutor—Suit not maintainable.

A having been badly beaten was carried to a police station, where he named *X* and others as the persons who had attacked him. The police, after making the usual investigation, arrested the persons named by *A* and sent them before a Magistrate, who committed them all to the Court of Session. The result of the trial was that the accused were all acquitted. *Held* that no suit for damages for false imprisonment would under those circumstances lie against *A*. *Narasinga Row v. Muthaya Pillai* (1) followed.

In this case the plaintiff Basdeo Pande sued his half-brother Balbhaddar for damages alleging that on the 22nd April 1903 the defendant had made a false report against him at the Gopiganj police station in the district of Mirzapur, and that in consequence of this report the plaintiff had on the 23rd April been taken into custody and kept in custody until the 23rd of July 1903. He claimed damages to the extent of Rs. 832-8. In fact the defendant had been assaulted severely on the 22nd of April 1903; had been carried to the Gopiganj police station, and there had named the plaintiff and others as his assailants. The police made inquiries and arrested the plaintiff and the others who were named by the defendant as participators in the assault upon him. These persons were placed before the Sub-Divisional Magistrate, who, after a preliminary inquiry, committed them to the Court of Session. The Court of Session, however, acquitted all the accused. In this suit the court of first instance (Subordinate Judge of Mirzapur) decreed the plaintiff's claim in full, and on appeal this decree was upheld by the District Judge. The defendant thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji*, for whom Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *M. L. Agarwala*, for the respondent.

STANLEY, C.J., and RUSTOMJEE, J.—This appeal must be allowed. The suit is one for damages for alleged false

* Second Appeal No. 363 of 1905, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 24th of January 1905, confirming a decree of Shah Amjad Ullah, Subordinate Judge of Mirzapur, dated the 11th of October 1904.

(1) (1902) I. L. R., 26 Mad., 362.

imprisonment and was brought under the following circumstances:—The defendant appellant Balbhaddar was badly beaten by some person or persons on the 22nd of April 1903. He was carried to the police station at Gopiganj and there reported the circumstances of the occurrence and named the plaintiff and others as being the perpetrators of the assault upon him. The police made the usual inquiries and arrested the plaintiff and the others who were named along with him as participators in the assault, and sent them up to the Sub-Divisional Magistrate, who, after holding a preliminary inquiry, committed them all for trial to the Court of Session. The result of the trial was that all the accused were acquitted. This suit was then instituted to recover damages for false imprisonment. The imprisonment extended from 23rd of April to the 23rd of July 1903. Both the lower Courts have decreed the plaintiff's claim and awarded to him the very substantial sum of Rs. 832-8. From those decrees the present appeal has been preferred, the ground of appeal being that there having been an investigation by the police, and the arrest having been the result of that investigation, the suit against the appellant did not lie. We are of opinion that this ground of appeal is well founded. It would be a serious thing in a case in which a person who was assaulted, as was the plaintiff in this case, forthwith gave information to the police of what had occurred, and the police acting upon that information held an inquiry which resulted in a criminal prosecution, if under such circumstances the informant should be held liable to be sued in a Civil Court for damages for false imprisonment. We think that the decision of a Bench of the Madras High Court in the case of *Narasingi Row* v. *Muthaya Pillai* (1) is correct. The facts of that case were very similar to the facts of the case before us. In that case the principal defendant gave information to the police that the plaintiff had illegally broken open the outer door of his house with intent to attach his property for arrears of kist. The station-house officer then held an investigation and subsequently charged the plaintiff before a Magistrate. The Magistrate tried the case and dismissed it, and thereupon the plaintiff sued for damages for malicious prosecution. It was held by Boddam and Bhashyam Ayyangar, JJ., that

(1) (1902) I. L. R., 26 Mad., 362.

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"the only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The first defendant is not responsible for their acts." We agree in this statement of the law. The present claim is for damages for false imprisonment. If a party is not liable for damages for malicious prosecution under the circumstances indicated above, it is difficult to see how he could be held liable for damages for false imprisonment. We allow the appeal, set aside the decrees of both the lower Courts, and dismiss the suit of the plaintiff with costs in all Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

1906
July 19.

Before Mr. Justice Sir George Knox.

EMPEROR *v.* ISHRI.*

Act No. XLV of 1860 *(Indian Penal Code), section 456—Lurking house-trespass by night—Intention—Burden of proof.*

The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her kandli. The evidence of the complainant clearly showed that the accused was not there with the consent, or at the invitation or for the pleasure of the complainant. *Held* that the accused was properly convicted under section 456 of the Indian Penal Code, it being for him to show that his intention was under the circumstances innocent. *Beg Ram* v. *The Queen-Empress* (1) distinguished. *Balmukund Ram* v. *Ghansiram* (2) followed.

In this case one Ishri was tried by a Magistrate of the first class for an offence under section 457 of the Indian Penal Code, the alleged offence being theft. The Magistrate found that the lurking house-trespass by night was proved, but that the offence which the accused intended to commit was probably not theft. The accused pleaded an *alibi*; the evidence as to this, however, was not believed. The Magistrate convicted the accused under

*Criminal Revision No. 315 of 1906.

(1) (1896) I. L. R., 19 All., 74. (2) (1894) I. L. R., 22 Calc., 391.

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section 456 and sentenced him to six months' rigorous imprisonment. Ishri appealed to the District Judge, who confirmed the conviction, but reduced the sentence to one of three months' rigorous imprisonment. The convict then applied to the High Court in revision, his main plea being that the facts found by the Magistrate were not such as would support a conviction under section 456 of the Indian Penal Code.

Mr. *A. H. C. Hamilton*, for the applicant.

The Officiating Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

KNOX, J.—The accused, Ishri, has been convicted of an offence under section 456 of the Indian Penal Code. I am asked to interfere in revision on the ground that the evidence for the prosecution does not prove that the accused was in the house with a criminal intent. Reliance is placed upon the case, *Brij Basi* v. *The Queen Empress* (1). The present case differs from *Brij Basi* v. *Queen-Empress* in one very important point. In the case quoted the offence of which the accused was convicted was house-trespass with intent to commit adultery. The husband was not called as a witness and did not appear as a witness, and the nephew who was the complainant and who was living in the house, was also not called as a witness. In the present case the husband was called as a witness and gave evidence at great length. He was cross-examined at considerable length also, and throughout the cross-examination the question was never asked him—"Did not Ishri come into the house with your consent?" One thing is abundantly clear from his evidence that Ishri's presence in his house, namely, the complainant's house at midnight was not with the consent, or at the invitation of or for the pleasure of the complainant. The case is a very simple one. The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her hansli. This may have been conjecture on her part, but whatever the intent was with which the accused entered the house, the knowledge of that intent is specially within his knowledge, and if that intent was an innocent one, it was for him to say what it was, even if I do not go so far

(1) (1896) I. L. R., 19 All., 74.

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as the Indian Evidence Act requires me to go, as the burden of proving it is on him. In his defence the accused set up an *alibi*. The learned counsel who appears for the accused strenuously contended that inasmuch as the intention was an ingredient of an offence under section 456, it was for the prosecution to prove that the intention was a criminal one. In other words, if the owner of a house wakes up at midnight and finds a person inside the house and if he is not able to prove that he came there with a criminal intent and that man denies that he came to the house, it is still for the owner to prove that that intent was a criminal one. I fully agree with what has been laid down by the Judges of the Calcutta High Court in a precisely similar case—*Balmakund Ram* v. *Ghansamram* (1)—and it is not for the first time in this Court that I have laid down the same. The learned Judges say, *vide* page 407:—"We were told that this did not prove any intention, though it might raise a suspicion of the intention being guilty. But what is the meaning of proof as defined in the Evidence Act, which is the law of the land? By section 3 of the Act 'a fact is said to be proved, when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' That is the definition which the Legislature has laid down for our guidance as to when a fact is said to be proved. We may add that it is only the embodiment of a sound rule of common sense: and applying this definition and this rule of common sense to this case, we feel bound to say that a guilty intention is proved in this case and that it must have been some one of those mentioned in section 441 of the Indian Penal Code, though it is not easy to say precisely which of those it was." The petition fails, and I dismiss it.

(1) (1894) I. L. R., 22 Calc., 391.

APPELLATE CIVIL

1906
July 20.

Before Mr. Justice Aikman

CHIDDU AND OTHERS (PLAINTIFFS) v. KUNWAR SEN AND OTHERS (DEFENDANTS) *

Act No X of 1873 (Indian Oaths Act), section 9—Agreement to be bound by statement on oath of specified person—Such agreement not revocable except for special cause

Where a party to a suit has made either a reference to arbitration or a reference to the oath of a witness such as is provided for by section 9 of the Indian Oaths Act, 1873, he should not be allowed arbitrarily to withdraw from the reference *Lekhraj Singh* v. *Dulkma Kuar* (1) and *Ram Narain Singh* v. *Babu Singh* (2) referred to.

THIS was a suit for possession of a plot of *sir* land. In the Court of first instance the parties stated that they had agreed to abide by the statement on oath of one Sobha Ram. Sobha Ram was summoned, and he stated that the plaintiffs had never been in possession of the land for 16 years and that one of the defendants, Sarnam, was in possession. In accordance with this statement the suit was dismissed. Before Sobha Ram's evidence was recorded the plaintiffs had attempted to resile from their agreement upon the ground that Sobha Ram had colluded with the opposite side; and they again raised the point in appeal. The Additional District Judge however, held that the appellants could not be allowed to withdraw their consent to the reference and dismissed the appeal. There was in fact no evidence whatever to suggest that the referee had colluded with the defendants. The plaintiffs thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru* (for whom Munshi *Brij Narain Gurtu*), for the appellants.

The Hon'ble Pandit *Madan Mohan Malaviya*, for whom Munshi *Iswar Saran*), for the respondents.

AIKMAN, J.—In this case the parties to the suit put in a joint application stating that they had agreed that the case should be decided according to what a certain person named Sobha Ram

* Second Appeal No. 347 of 1905, from a decree of J. H. Cuming, Esq., Additional Judge of Aligarh, dated the 21st of December 1904, confirming a decree of Munshi Chajju Mal, Munsif of Etah, dated the 15th of June 1904.

(1) (1880) I. L. R., 4 All., 302. (2) (1896) I. L. R., 18 All., 46 at p. 49.

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should state on oath. The learned Munsif accordingly issued a summons to Sobha Ram. When he appeared, the plaintiffs, who are appellants here, made certain allegations of collusion against Sobha Ram and asked to be allowed to withdraw from the reference. The learned Munsif refused to allow them to withdraw, and as Sobha Ram stated that the plaintiffs had not been in possession of the land in dispute for 16 years, and that the defendants had been in possession, he dismissed the suit. The decision of the Munsif was affirmed on appeal by the learned Additional Judge of Aligarh. The plaintiffs come here in second appeal. In my judgment the Court below was right. In my opinion when a party to a suit has made a reference of this kind, whether it be considered to be a reference to arbitration or a reference to the oath of a witness, such as is referred to in section 9 of the Indian Oaths Act, 1873, he should not be allowed arbitrarily to withdraw from the reference. In this case the plaintiffs produced no evidence whatever to support their allegation that the referee had colluded with the opposite party. I agree with what was said by Stuart, C.J., in *Lekhraj Singh* v. *Dalhma Kuar* (1). I would also refer to what is said in the case of *Ram Narain Singh* v. *Babu Singh* (2). For the above reasons I am of opinion that this appeal must fail and I dismiss it with costs.

Appeal dismissed.

[*Cf.* also *Bansidhar* v. *Sital Prasad*, *supra*, p. 13.—ED.]

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July 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

RAMJI MAL AND ANOTHER (DEFENDANTS) v. CHHOTE LAL (PLAINTIFF) AND BANDHU LAL (DEFENDANT) *

Act No. III of 1877 (Indian Registration Act), section 17—Registration—Division of a mortgage into two to escape registration.

Held that there is nothing in the Registration Act to render illegal the division of what was apparently one mortgage transaction relative to a loan of Rs 198 into two mortgages of even date each for Rs. 99.

* Second Appeal No. 729 of 1905, from a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 27th of February 1905, [illegible] of Babu Prithwi Nath, Munsif of Aonla-Faridpur, dated the 12th of December 1904.

(1) (1880) I. L. R., 4 All., 302. (2) (1895) I. L. R., 18 All., 46, at p. 49.

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RAMJI MAL v. CHHOTE LAL.

THE facts of this case are as follows :—

The plaintiff Chhote Lal at an auction sale in execution of a decree held by one Ram Narain against Bandhu Lal purchased a certain house. Subsequently to this purchase one Bansidhar sued for the sale of the house in satisfaction of two mortgage-deeds held by him. Bansidhar obtained a decree and the house was put up for sale. When Bansidhar applied for execution of his decree, application was made by one Gulzari Lal for notification of his lien under two unregistered mortgage-deeds, each for Rs. 99 executed on the same day by Bandhu Lal, and this application, though objected to by the plaintiff, was allowed. The plaintiff then instituted the present suit, in which he prayed for a declaration that the two mortgage-deeds held by Gulzari Lal might be declared fictitious and collusive and not binding on the property purchased by him. The Court of first instance (Munsif of Bareilly) dismissed the suit. On appeal, however, the Subordinate Judge held that the two mortgage-deeds in suit formed one and the same transaction by which a sum of Rs. 198 had been borrowed by the mortgagor from the mortgagee, and that the transaction should have been embodied in one deed of the value of Rs. 198. If this had been the case, the deed would have required registration. On this reasoning the Court held that the deeds were inadmissible for want of registration, and accordingly allowed the appeal and decreed the plaintiff's claim. Against this decree the sons of Gulzari Lal, who had since died, appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellants.

Dr. *Satish Chandra Banerji* (for whom Babu *Sital Prasad Ghose*), for the respondents.

STANLEY, C.J., and RUSTOMJEE, J.—The plaintiff respondent was the auction purchaser of a house. Subsequently to his purchase it was sold in execution of a decree enforcing a mortgage created by two unregistered bonds of different dates. When the property was put up for sale, the defendant, who had two mortgage bonds of the value of Rs. 99 each of even date (the 22nd of November 1899) applied that his lien may be proclaimed. The plaintiff objected, but his objections were dismissed. He then

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brought the present suit under section 283 of the Code of Civil Procedure. The Court of first instance dismissed the suit. An appeal was preferred to the District Judge's Court, and was decided by the Subordinate Judge. He held that as the two mortgage deeds formed portions of one and the same transaction by which a sum of Rs. 198 had been borrowed by the mortgagor from the mortgagee, the transaction should have been embodied in one deed of the value of Rs. 198. This would have necessitated the deed being registered. By thus securing the loan through two separate deeds the defendants avoided the expenses he would have had to incur under the Registration Act. He therefore held that the two deeds were invalid and hence he decreed the appeal and the plaintiff's claim, awarding him costs in both the Courts.

Before us the same point is raised in this second appeal, and it is urged that no fraud was committed in the transaction through having embodied the amount of the loan in two separate deeds of the value of Rs. 99 each. We agree with this view of the case. There is nothing in the Registration Act which forbids the splitting up of a transaction in this manner. We therefore allow this appeal and set aside the decree of the lower appellate Court. Since it decided this appeal on a preliminary point, we remand it under section 562 of the Code of Civil Procedure for decision of the remaining points on their merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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July 24.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

SHI GOPAL AND OTHERS (DEFENDANTS) v. AYESHA BEGAM AND ANOTHER (PLAINTIFFS), AND KASIM ALI AND OTHERS (DEFENDANTS).*

Possession—Suit for possession based on possession of title of plaintiff's predecessor—Plaintiffs never themselves in possession—Cause of action.

Musammat Wazir Jan, the owner of certain zamindari property, died on the 18th of December 1889, leaving no direct heirs. After her death the property was taken possession of by the four nephews of Musammat Wazir Jan's deceased husband. One of these nephews, Rahmat, died in the 7th of August 1890, whereupon the share of which he had been in possession was appropriated by his son Kasim to the exclusion of Musammat Ayesha

* Second Appeal No. 157 of 1901 from a decree of W. F. W. Webb, Esq., District Judge of Agra, dated the 14th of December 1900, confirming the decree of Babu Baidya Nath Das, Munsif of Agra, dated the 23rd of February 1900.

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Begam and Kudrat Begam. While in Kasim's possession the property, or part of it, was sold in execution of a decree against Kasim and purchased by Shi Gopal and others. On the 7th of August 1902, Kasim's sisters sued to recover their shares of the property as heirs of Bisharat.

Held by KNOX, J. (*dissentiente* AIKMAN, J.) that, inasmuch as the plaintiffs had never at any time been in possession of the property claimed by them, their suit would not lie *Asher* v. *Whitlock* (1), *Gobind Prasad* v. *Mohan Lal* (2), *Narayana Row* v. *Dharmachar* (3), *Pahlwan Singh* v. *Ram Bharose* (4), *Sundar* v. *Parbati* (5), and *Ismail Ariff* v. *Mahomed Ghous* (6), distinguished. *Hodson* v. *Walker* (7), and *Butcher* v. *Butcher* (8) referred to.

AIKMAN, J.—*Contra*. The plaintiff's father Bisharat having held a possessory title—heritable and transferable—good as against all except the true owner, there was nothing to prevent his heirs bringing the present suit. *Wali Ahmad Khan* v. *Ajudhia Kandu* (9), *Gobind Prasad* v *Mohan Lal* (2), *Asher* v *Whitlock* (1), *Doed. Pritchard* v. *Jauncey* (10), *Pahlwan Singh* v. *Ram Bharose* (4), *Babu Ram* v. *Banke Behari Lal* (11), *Narayana Row* v. *Dharmachar* (3) and *Sundar* v. *Parbati* (5) referred to.

THIS was a suit to recover possession of certain immovable property, and arose out of the following facts. The property in suit originally belonged to one Musammat Wazir Jan, who died on the 18th of December 1889, leaving no direct heirs. Possession of the property was on her death taken without any legal title to the same by the four nephews of her deceased husband. One of these nephews, Bisharat, was the father of the plaintiffs respondents Ayesha Begam and Kudrat Begam. Bisharat died on the 7th of August 1890. His share of the property mentioned above was taken possession of by his son Kasim Ali to the exclusion of his (*i.e.*, Kasim's) sisters, the plaintiffs. The appellants Shi Gopal and others got a decree against Kasim and purchased the property in 1901. The suit out of which this appeal arises was brought by Bisharat's two daughters against their brother Kasim and the auction purchasers to recover the share of the property which they claim by right of inheritance from their father Bisharat. They obtained a decree from the Court of first instance (Munsif of Agra) which was affirmed on appeal by the learned District Judge. The defendants, auction purchasers, appealed against this decree to the High Court.

(1) (1865) L. R., 1 Q. B., 1.
(2) (1901) I. L. R., 24 All., 157.
(3) (1902) I. L. R., 26 Mad., 514.
(4) (1904) I. L. R., 27 All., 169.
(5) (1889) I. L. R., 12 All., 51.
(6) (1893) I. L. R., 20 Calc., 834.
(7) (1872) L. R., 7 Exch., 55.
(8) (1827) 7 B and C., 399.
(9) (1891) I. L. R., 13 All., 537.
(10) (1837) 8 C. and P., 99
(11) Weekly Notes, 1906, p 184.

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Dr. *Satish Chandra Banerji*, for the appellants.

Mr. *Abdul Majid* and the Hon'ble Pandit *Sundar Lal*, for the respondents.

KNOX, J.—This second appeal arises out of a suit brought by two ladies who, as daughters of one Bisharat Ali, laid an action in ejectment against certain persons, purchasers of the property in dispute. These last named persons are in possession of that property under a sale-deed executed in their favour by one Kasim Ali, a son of the same Bisharat Ali. Kasim Ali was arrayed as co-defendant with his vendees.

They also asked for mesne profits.

Both the Courts below decreed the claim. The appellants, who are some out of the transferees from Kasim Ali, have come here in second appeal. They set out in their memorandum of appeal four pleas. The first and second were not pressed, but the third and fourth have been maintained, and we are indebted to the learned advocate who appeared for the appellants for a very able, elaborate and exhaustive argument on the remaining pleas. Before entering upon this argument it is better to set out the facts of the case.

The property in dispute was originally the property of one Musammat Wazir Jan. She died on the 18th of December 1889, leaving no direct heirs. The four nephews of her deceased husband took possession of this property without any legal title to the same. Part of this property was waqf property, but with this part of the property we are not concerned in this second appeal. With the consent of the remaining nephews, one nephew, Bisharat Ali, was appointed manager of the waqf and recorded as owner of the property in dispute. Bisharat Ali died on the 7th of August 1890, and on August 9th, 1890, Kasim, son of Bisharat Ali, the present respondent, was in turn recorded as owner of the disputed property. The three nephews sued Kasim for partition. They obtained three-fourths of the property and the remaining fourth was left in the hands of Kasim. Kasim appears to have been considerably in debt. His property was brought to sale and purchased by the appellants. On the 7th of August 1902 the daughters of Bisharat Ali instituted the present suit against their brother Kasim and his transferees for the share in the property to which they lay claim as heirs of Bisharat Ali.

If these facts have been correctly stated, the action which I have to consider is an action in ejectment laid by the heirs of a trespasser whose only title to the land was possession, heirs who at the highest had a right to possession, but have never entered upon possession, against transferees from a trespasser who are in possession and whose possession in their own persons and in the person of their transferors has been peaceable possession for twelve years all but two days.

The contention on behalf of the appellants is that the appellants, inasmuch as they are transferees from Kasim, who was and has been in peaceable possession, are entitled to retain that possession against every one but the "rightful owner" and they contend that the plaintiffs are not such "rightful owners." Reliance is placed upon the case of *Asher* v. *Whitlock* (1) and the rule of law therein laid down that possession is good title against all but the true owner.

The learned vakil for the respondents maintains that the doctrine contained in *Asher* v. *Whitlock*, especially as it has been interpreted in *Gobind Prasad* v. *Mohan Lal* (2), *Narayana Row* v. *Dharmachar* (3), *Pahlwan Singh* v. *Ram Bharose* (4), *Sundar* v. *Parbati* (5) and *Ismail Ariff* v. *Mohamed Ghous* (6), is entirely in favour of his clients.

The point raised is by no means an easy one to decide, but after very careful consideration I have come to the conclusion that in the case now under consideration the possession of the appellants should prevail. The case before me differs, as I shall presently show, from all the cases cited by the respondents which I consider in this point, and it is a point fatal to the respondents' claim, that in all those cases the person claiming to be rightful owner showed that he, or the person from whom he derived title, was in possession at the time when the trespasser entered upon possession.

In *Asher* v. *Whitlock* Mary Ann Williamson from whom Asher derived title was in possession till February 1863. Whitlock, the trespasser, entered upon the property in April 1861. In *Govind Prasad* v. *Mohan Lal*, Balkishan, from whom Govind

(1) (1865) L. R., 1, Q. B., 1.
(2) (1901) I. L. R., 24 All., 157.
(3) (1902) I. L. R., 26 Mad., 514.
(4) (1904) I. L. R., 27 All., 169.
(5) (1880) I. L. R., 12 All., 51.
(6) (1883) I. L. R., 20 Calc., 834.

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Prasad derived title, was in possession up to the 6th September 1895 and the trespasser through Musammat Gaura entered into possession immediately upon the 6th September 1895. This case may, however, be left out of consideration, for Govind Prasad really succeeded upon good and valid title as next heir to the original rightful owner of the property, and the question which arises in this case did not as a matter of fact arise in that case.

In *Narayana Row* v. *Dharmachar* (1), Dharmachar through Jayachar was in possession up to 1893, and the trespasser entered into possession some time in 1897, either himself or through the lessees whose lease expired in 1897.

In *Pahlwan Singh* v. *Ram Bharose* (2), Rajkunwar from whom Ram Bharose derived title was in possession up to 6th June 1902, when she let Pahlwan Singh and Rodhan, the trespassers, into possession. In *Sundar* v. *Parbati* (3), Sundar was throughout in possession up to and after she brought her suit. In *Ismail Ariff* v. *Mohamed Ghous* (4), Ismail Ariff was in possession up to and after he brought his suit.

In all these cases then the plaintiffs who based their title upon possessory titles could show possession up to, if not after, the moment when trespass was committed by the persons against whom they sought to maintain their title.

In the present case, while it cannot be questioned that Bisharat Ali had such possession as conferred an interest which was capable of being inherited by his daughters, the present appellants, it has not been shown that that right to possession ever matured into possession, and consequently it has not been shown that when Kasim Ali entered as a trespasser the ladies were in possession either directly or indirectly.

It must not be overlooked that nowhere in the plaint do the appellants state that Kasim Ali held on their behalf or as trustees for them. This idea was apparently suggested by the issues which were struck by the Court of first instance. The judgment of the lower appellate Court on this point runs as follows:—

"The question as to whether the plaintiffs received profits from their brothers need hardly be considered. The evidence that

(1) (1902) I. L. R., 26 Mad., 514.
(2) (1904) I. L. R., 27 All., 169.
(3) (1889) I. L. R., 12 All., 51.
(4) (1893) I. L. R., 20 Calc., 834.

they did is doubtful, and I find that they have not proved such receipts. But they are entitled to claim as the heirs of Bisharat."

This shows that the position, if ever taken up in sober earnest, was never established. The appellants, according to the learned Judge, succeed only on the bare title that they are the heirs of Bisharat Ali and have acquired his right as in possession to maintain that possession as against all but the rightful owner.

This being the case, and that right to possession never having ripened into possession for a single moment, can they maintain an action of ejectment? For they are out of possession, and before they succeed they must, as they realize in their plaint, eject the respondents.

In *Hodson* v. *Walker* (1) that eminent lawyer Baron Martin observed in an action for ejectment that "it is common learning that to maintain trespass to real property the plaintiff must have been in possession at the time the trespass was committed. The gist of the action is the injury to the possession, and the plaintiff's having the title will not enable him to maintain trespass: 1 Chitty on Pleading, pp. 149—197: *Butcher* v. *Butcher* (2)."

In Cole on Ejectment it is pointed out (Ed. 1857, p. 218) that "if a defendant is shown to be a mere wrongdoer, proof of prior possession and of the wrongful act of the defendant whereby the plaintiff was deprived of possession are sufficient *primâ facie* evidence of title to maintain an action for ejectment. See also *Butcher* v. *Butcher* (2), where Lord Tenterden, C.J., held that "if he who has the right to land enters and takes possession he may maintain trespass."

All that the appellants prove in this case is that their father was in possession of this land before the respondents, and that they have a right to inherit from him, nothing more. They set up the presumption of possession against the presumption which the respondents put forward—"*Possessio contra omnes valet præter eum cui jus sit possessionis*"—and the onus being upon them their case should fail. The right to inherit coupled with their father's possession would not avail against the rightful owners, the heirs of Musammat Wazir Jan, if any came forward and established their title; should it be allowed to prevail against

(1) (1872) L. R., 7 Exch., 55. (2) (1827) 7 B. and C. 399.

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Kasim Ali, who entered upon the land when vacant and has held it for well nigh twelve years? If on the other hand they could go further and prove that while they were in peaceable possession Kasim Ali ejected them, it would be very different. But this they have not done. If Bisharat Ali were alive and had remained out of possession, as his daughters have done, and had instituted this suit against Kasim Ali, he could not have obtained a decree. Is it not an anomaly that his daughters should obtain that which he could not have obtained?

I would therefore decree the appeal, but as I have the misfortune to differ from my learned colleague, and his judgment is for affirming the decree appealed against, that decree must be affirmed.

AIKMAN, J.—The property which forms the subject matter of this second appeal belonged to one Musammat Wazir Jan, who died on the 18th of December 1889, leaving no direct heirs. Possession of the property was on her death taken by the four nephews of her deceased husband. One of these nephews was Bisharat was the father of the plaintiffs respondents Ayesha Begam and Kudrat Begam. Bisharat died on the 7th of August 1890. His share of the property mentioned above was taken possession of by his son Kasim Ali to the exclusion of his (*i.e.*, Kasim's) sisters, the plaintiffs. The appellants got a decree against Kasim and purchased the property in 1901. The suit out of which this appeal arises was brought by Bisharat's two daughters against their brother Kasim and the auction purchasers to recover the share of the property which they claim by right of inheritance from their father Bisharat. They obtained a decree from the Court of first instance which was affirmed on appeal by the learned District Judge. The defendants, auction purchasers, come here in second appeal. Several grounds are set forth in the memorandum of appeal, but the one ground urged and most ably argued by the learned advocate for the appellants is that, under the circumstances stated, the plaintiffs are not entitled to recover the property as heirs of their father Bisharat. I was much impressed by many of the arguments put forward by the appellants' learned advocate, but in my opinion the appeal cannot succeed, as the case is covered by authority. It has

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been decided by a Full Bench of this Court in *Wali Ahmad Khan* v. *Ajudhia Kandu* (1) that the provisions of section 9 of the Specific Relief Act do not debar a person who has been ousted by a trespasser from immovable property to which he has merely a possessory title from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. In the case of *Gobind Prasad* v. *Mohan Lal* (2) it was held by the learned Chief Justice and Burkitt, J., that "a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable." In the case just cited reliance is placed on the case of *Asher and wife* v. *Whitlock* (3), which decision clearly supports the view taken by this Court in the case just mentioned. In *Asher* v. *Whitlock* it was contended in argument that where there are two trespassers the one last in possession is entitled to keep the land until the person having title ejects him, but this argument did not find favour with the Court. As I understood the learned advocate for the appellants, his case was that as the plaintiffs had never themselves been in possession they were not entitled to maintain a suit based on their father's possessory title; but the facts of the case of *Asher* v. *Whitlock* are clearly against this proposition, as there a suit by the heir at law of the devisee of a testator who had himself no good title to the land which he bequeathed was successful, the defendant not being able to show title in himself and not having acquired any right by prescription, although the heir at law had never been in possession. I would also refer to the case of *Doe d. Pritchard* v. *Jauncey* (4). That was a suit in ejectment tried before Mr. Justice Coleridge and a jury at the Worcester Assizes in 1837. In summing up to the jury the learned Judge says :—"The father at the time of his death had occupied but seventeen years, and the learned counsel for the defendant has said that, as the father had not a good title then,

(1) (1891) I. L. R., 13 All., 537.
(2) (1901) I. L. R., 24 All., 157.
(3) (1865) L. R., 1 Q. B., 1.
(4) (1837) 8 C. and P., 99.

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from not having possessed twenty years, the property would not descend to his heir, but would go to his executor. That is not so, for the moment the father had taken it, if he died, it would (provided the owner did not interfere) descend to his son." The case in I. L. R., 24 Allahabad, was followed in *Pahlwan Singh* v. *Ram Bharose* (1) and in *Babu Ram* v. *Banke Bihari Lal* (2). The authorities on this point were considered by the Madras High Court in *Narayana Ram* v. *Dharmachar* (3), where it was held that possession under the Indian as under the English law is good title against all but the true owner. There is a paragraph on page 518 of the judgment, the opening words of which, if taken by themselves, would seem to support the appellants' case. But to take those opening words by themselves would be to go against the case of *Asher* v. *Whitlock*, and when the paragraph is read as a whole it is clear that it is not in favour of the appellants' case. In the body of that judgment the learned Judges of the Madras High Court say, at page 516:—"In the language of modern English authorities possession is good title against all but the true owner, and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed." This in my judgment correctly repre-ents the law as laid down by the authorities. It is apparent from the judgment of Lord Watson in the case of *Sundar* v. *Parbati* (4) that their Lordships of the Privy Council approved of the doctrine laid down in *Asher* v. *Whitlock*.

The case then stands thus. Bisharat, the plaintiffs' father, had a possessory title which on his death passed to his heirs. His daughters, the plaintiffs, were entitled to a share of this property, the whole of which was wrongfully taken possession of by their brother. They have brought their suit within the statutory period of twelve years. They have a good case against him to recover possession, and they have an equally good case against the appellants who derive their title through him. This disposes of the only plea urged in appeal. I would for these reasons dismiss this appeal with costs.

(1) (1904) I. L. R., 27 All., 160.
(2) Weekly Notes, 1906, p. 184.
(3) (1902) I. L. R., 26 Mad., 514.
(4) (1880) I. L. R., 12 All., 51.

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BY THE COURT:

The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

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MISCELLANEOUS.

Before Mr. Justice Sir George Knox.

IN THE MATTER OF THE PETITION OF MUHAMMAD ABDUL HAI.*

Act No. XVIII of 1879 *(Legal Practitioners' Act), sections* 13 *and* 14—*Jurisdiction—Inquiry by Court subordinate to the High Court into conduct of pleader practising before it.*

Held that the words "any such misconduct as aforesaid" as used in section 14 of the Legal Practitioners Act, 1879, relate to all the cases set out in section 13 of the Act. The authority therefore to inquire into a matter falling within the purview of section 13, clause *(f)*, of the Act is not confined to the High Court, but may be exercised by a subordinate Court before which the pleader or mukhtar whose conduct is called in question may be practising. *In the matter of Purna Chander Pal, Mukhtar* (1). *In the matter of Southekai Krishna Rao* (2) and *In the matter of a Pleader* (3) referred to.

THIS was an application arising out of the following circumstances. On the 15th of May 1906 the District Magistrate of Bijnor passed an order directing a Deputy Magistrate to charge one Muhammad Abdul Hai, a pleader, under section 14 of the Legal Practitioners Act and to adjudicate on the charge. The alleged improper conduct on the part of the pleader was that of "tempting and inducing two subordinates to act contrary to their duty in allowing him to examine the treasury cash book." The pleader concerned applied to the High Court under "section 15 of the Indian High Courts' Act" praying that the Court under its general powers of superintendence might order the District Magistrate not to take proceedings against the applicant upon the ground that the District Magistrate had no jurisdiction conferred upon him by the Legal Practitioners Act, 1879.

Mr. *Abdul Majid* and Babu *Surendra Nath Sen*, for the applicant.

The Officiating Government Advocate (Mr. *W. Wallach*), in support of the order.

* Miscellaneous No. 225 of 1906.

(1) (1899) I. L. R., 27 Calc., 1023. (2) (1887) I. L. R., 15 Calc., 152.
(3) (1902) I. L. R., 26 Mad., 448.

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KNOX, J.—On the 15th of May 1906 the Collector and Magistrate of Bijnor directed a Deputy Magistrate subordinate to him to charge a certain pleader under section 14 with improper conduct and to adjudicate on the charge. The improper conduct in another portion of the order is set out as consisting of tempting and enticing two subordinates of the Collector's office to act contrary to their duty in allowing him, the pleader, to examine the treasury account-book. The pleader concerned applied to this Court under "section 15 of the Indian High Courts' Act" and asked this Court to direct the Collector of Bijnor not to make any inquiry. The learned counsel who appears for the pleader concerned contends that section 14 of the Legal Practitioners' Act, 1879, empowers Courts subordinate to this Court only to hold inquiry into cases which fall within clauses *(a)* and *(b)* of section 13 of the said Act. Clause *(f)* of the same section, which contains the words "for any other reasonable cause," must, he argued, be interpreted, so far as section 14 is concerned, as "for some cause amounting to misconduct in the discharge of his professional duties" and it did not empower such Court to hold inquiry for any cause under section 13 falling outside clauses *(a)* and *(b)* of section 13, and misconduct in the discharge of professional duty. In support of his argument he referred this Court to the case of *In the matter of Purna Chunder Pal, Mukhtar* (1), and particularly to that portion of the judgment of Mr. Justice Hill which is to be found at page 1041:—"Section 14 deals with that power and provides that, if a pleader or mukhtar practising in any subordinate Court is charged in such Court with 'taking instructions as aforesaid' or 'with any such misconduct as aforesaid,' the presiding officer shall send him a copy of the charge and also a notice that, on a day to be appointed therein, such charge will be taken into consideration; and then follow directions as to the procedure to be adopted in the matter. The taking of instructions and misconduct here referred to relate to clauses *(a)* and *(b)* respectively of section 13—see *In the matter of Southekal Krishna Rao* (2)—and it is only in such cases that a subordinate Court is authorized to proceed under section 14." The view taken by Hill, J., undoubtedly supports the argument put

(1) (1899) I. L. R., 27 Calc., 1023. (2) (1887) I. L. R., 15 Calc., 152.

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forward by the learned counsel, but with the greatest respect to that learned Judge, it appears to me that sufficient weight was not attached to the important change which was introduced into section 13 of Act XVIII of 1879 by Act No. XI of 1896. At any rate I find no specific allusion to the change by which the various offences enumerated in section 36 of Act No. XVIII of 1879 were removed from the place where they originally stood in the Act and so placed as to precede section 14, or it may be that, as the misconduct which was then before the Judge was misconduct which had taken place in 1891 or some earlier date, it was held that the case was one which fell within the law as contained in the earlier Act. I find that this point was specially considered by Ghosh, J., who came to the conclusion that it was extremely doubtful whether such misconduct, namely, misconduct antecedent to enrolment of the mukhtar as mukhtar was "any other reasonable cause," within the meaning of section 13, and he doubted that the Legislature ever intended to provide for such a case. Still, as will be seen from the whole tenour of his judgment, he considered that the words "any such misconduct as aforesaid" in section 14 of the Act as amended did apply to all the provisions contained in the amended section 13. Anyhow the case upon which Hill, J., relied, namely, *In the matter of Southekal Krishna Rao* (1) was a case in 1887 antecedent to the change which was made in section 13. If I were to adopt the construction which the learned counsel for the pleader wishes me to adopt, I should be practically holding that offences falling within clauses *(c)* to *(f)* are not misconduct into which subordinate Courts can hold inquiry. Although I do not base my judgment on the inconvenience which would be caused to subordinate Courts, I base my judgment on the inconvenience which would be caused to legal practitioners, and also to this Court, were this Court the only Court that could hold inquiry into the cases falling under clauses *(c)*, *(d)*, *(e)* and *(f)* which had been committed or which were said to have been committed before a subordinate Court. Looking to the difference between sections 13 and 14 as they originally stood, and sections 13 and 14 as they now stand, I find myself compelled to hold that the words "any such

(1) (1887) I. L. R., 15 Calc., 152.

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misconduct as aforesaid" relate to all the cases set out in section 13. In reply my attention was called to the case—*In the matter of a Pleader* (1), in which the writing of an anonymous letter by a pleader containing allegations which were intended to prejudice the mind of an officer in connection with a matter which he was investigating was held by the Madras High Court to be "other reasonable cause" within the meaning of clause *(f)* of section 13. In so holding that High Court added that they accepted the interpretation of clause *(f)* of section 13 of the Legal Practitioners' Act of 1879 which was adopted by the Calcutta High Court in *In the matter of Purna Chunder Pal, Mukhtar*. Holding therefore, as I do, that the subordinate Court has jurisdiction to take action under section 14 of Act No. XVIII of 1879, I find no cause for interfering. I dismiss the application.

1906
August 13.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

KUNDAN AND OTHERS (DEFENDANTS) *v.* BIDHI CHAND (PLAINTIFF).*

Act No. V of 1882 *(Easements Act), section 4—Easement—Right of privacy—Suit by occupier of house.*

Not only the owner, but the lessee or other person in lawful possession of premises may maintain an action if his right of privacy is interfered with. *Gokal Prasad* v. *Radho* (2) referred to.

THE plaintiff in this case sued as a lessee of a certain house to obtain an injunction for the closing of a door opened by the defendants upon the ground that the door in question interfered with the plaintiff's right of privacy. The Court of first instance (Munsif of Koil) decreed the plaintiff's claim, and the lower appellate Court (additional Subordinate Judge of Aligarh) affirmed the decree though in a modified form. The defendants appealed to the High Court, urging mainly that the plaintiff, not being the owner of the house, had no right to sue.

Munshi *Gulzari Lal*, for the appellants.

* Second Appeal No. 255 of 1905, from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 13th of January 1905, modifying a decree of Babu Jagat Narain, Munsif of Koil, dated the 5th of May 1904.

(1) (1902) I. L. R., 26 Mad., 448. (2) (1888) I. L. R., 10 All., 358.

Mr. *M. L. Agarwala* (for whom Munshi *Gobind Prasad*), for the respondent.

AIKMAN, J.—The plaintiff, who is respondent here, obtained from the lower appellate Court an injunction directing the appellants to close a certain door, which had been opened by them on the ground that it interfered with the plaintiff's privacy. The defendants come here in second appeal. The only plea urged before me is that the plaintiff could not maintain the suit as it was not shown that he was the owner of the house, the privacy of which was interfered with. In support of this plea reference is made to the case—*Gokal Prasad* v. *Radho* (1). It is true that at page 387 of the judgment in that case, it is said that an owner of a house has a good cause of action where there is substantial interference with the right of privacy. But I cannot take this as deciding that the owner only has a good cause of action in such a case. There is no reason why a lessee, or other person who is in lawful possession of premises, may not maintain an action if his right of privacy is interfered with. No plea is set up here to the effect that the door was opened with the consent of the owner of the house occupied by the plaintiff. The learned vakil for the appellants practically admits that the language of section 4 of the Easements Act, which defines an easement as a right which the owner or occupier of land possesses, is against him. I dismiss the appeal with costs.

The objection under section 561 of the Code of Civil Procedure is not pressed and is likewise dismissed.

Appeal dismissed.

(1) (1888) I. L. R., 10 All., 368.

1906
August 13.

Before Sir Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

ACHHEY LAL (DEFENDANT) v. JANKI PRASAD AND ANOTHER (PLAINTIFFS) *

Act (Local) No II of 1901 (Agra Tenancy Act), section 32—Occupancy holding—Jurisdiction—Civil and Revenue Courts.

Where plaintiffs sued in a Civil Court for possession under an agreement of part of an occupancy holding: *Held* that the suit would not lie, being contrary to the intention of section 32 of the Agra Tenancy Act, 1901.

THIS was a suit for recovery of possession of, amongst other cultivatory holdings, a moiety of some land situate in mauza Dunetia in the district of Muttra, of which the plaintiffs complained that they had been wrongfully dispossessed by the defendants. The plaintiffs and the defendants were descendants of one Nawal Kishore and were closely related, and the claim was based upon an agreement of the 16th of May 1894, under which the property of which the plaintiffs were joint owners was divided. The Court of first instance (Subordinate Judge of Agra) dismissed the claim upon the ground that the suit was not cognizable by a Civil Court in view of the provisions of section 32 of the Agra Tenancy Act, 1901. On appeal the District Judge modified the decree of the Court of first instance and gave a decree to the plaintiffs for possession as mortgagees of one-half of the holding in mauza Dunetia. Against this decree the defendant Achhey Lal, who was recorded as sole mortgagee of these holdings, appealed to the High Court.

Babu *Mohan Lal Sandal*, for the appellant.

Babu *Satya Chandra Mukerji*, (for whom Babu *Sital Prasad Ghose*), for the respondents.

STANLEY, C.J., and KNOX, J.—In the suit out of which this appeal has arisen the plaintiffs respondents claimed a decree for possession of amongst other cultivatory lands, a moiety of land situate in mauza Dunetia in the district of Muttra, of which they complained that they had been wrongfully dispossessed by the defendants. The plaintiffs and the defendants are the descendants of one Nawal Kishore and are closely related, and the claim is based upon an agreement of the 16th of May 1894,

* Second Appeal No 21 of 1905 from a decree of H. Warburton, Esq., District Judge of Agra, dated the 28th of September 1904, modifying a decree of Babu Raj Nath Prasad, Subordinate Judge of Agra, dated the 30th of June 1904.

under which the property of which they were joint owners was divided. The Court of first instance dismissed the claim on the ground that the suit was not cognizable by a Civil Court in view of the provisions of section 32 of the North-Western Provinces Tenancy Act, Act No. II of 1901. On appeal the learned District Judge modified the decree of the Court below and gave a decree to the plaintiffs for possession as mortgagees of one-half of the holdings in mauza Dunetia. Of these holdings the appellant, Achhey Lal, is recorded as the sole mortgagee. Against this decree the present appeal has been preferred.

The holding in question is an occupancy holding, and the only interest which the parties or any of them have in it is a mortgagee right. The learned District Judge in his judgment observes that "the lower Court has treated the suit as one for the division of holdings and has dismissed it as such under section 32 of Act II of 1901." He then says:—"I do not think this view is correct. In no case is it proposed to divide a holding. All the holdings are let to sub-tenants and the agreement is in effect merely that the rents of the holdings shall be collected in varying proportions by the parties to it. Nor is it a suit to divide the rents of holdings, but a suit to give effect to a certain agreement as to division which is a very different thing." We are unable to agree in the view of the learned District Judge. We think that the suit is one within the purview of section 32 and is not cognizable by a Civil Court. The Court is asked to declare that the plaintiff is entitled to an undivided share of an occupancy holding and to put him into possession of that share. To the agreement which forms the basis of the claim the landholder was no party. Section 32 (1) prescribes that "no division of a holding or distribution of the rent payable in respect thereof made by the co-sharers therein shall be binding on the landholder unless it is made with his consent;" and paragraph (2) of that section declares that "no suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any Civil or Revenue Court." Neither a Civil or Revenue Court can therefore partition or divide an occupancy holding. Such partition or division can only be effected out of Court with

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the consent of the landholder. What the Court is asked to do in this case is to declare that the plaintiffs, who at the last are joint owners of an occupancy holding, have a legal right to a definite share in such holding and to put them into possession of that share. This is in effect to declare that a division of a holding without the consent of the landholder is binding and enforceable. The section appears to us expressly to forbid this. We may add that if a Court is not permitted to entertain a suit for the division of a holding and cannot therefore divide the holding, it certainly, we think, ought not to attempt to adjudicate upon claims of joint tenants to be entitled to definite shares of such holding, and that too behind the back of the landholder. We may further point out that if the Court were at liberty to declare the rights of parties to separate parts or shares of an occupancy holding, great difficulty might be experienced in working out the provisions of section 22 of the Act in regard to the succession to tenancies. We think in view of the scope and object of the Tenancy Act that no restricted interpretation should be placed upon section 32. The Legislature has shown in unmistakeable terms that the division of a holding should not be permitted save with the consent of the landholder, and that a Civil or Revenue Court should not entertain a suit or other proceeding which has the effect of causing any such division.

We therefore allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance, dismissing the plaintiffs' claim with costs as therein provided. The plaintiffs respondents must pay the costs of this appeal and also the costs in the lower appellate Court. In view of our judgment in the appeal the objections fail and are dismissed.

Appeal decreed.

1906
August 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

LACHMI NARAIN (DEFENDANT) *v.* NIROTAM DAS AND ANOTHER (PLAINTIFFS) *

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 176, 177 and 182—Appeal—Jurisdiction.

Held that no third appeal will lie to the High Court from a decree of the District Judge passed in appeal from an appellate decree of the Collector under the provisions of the Agra Tenancy Act, 1901. *Lachmi Narain* v. *Nirotam Das* (1) followed.

THIS was a suit brought to recover arrears of rent in the Court of an Assistant Collector. The plaintiffs obtained a decree. The defendant preferred an appeal to the Collector under the provisions of section 176 of the Agra Tenancy Act, 1901. On this appeal the Collector affirmed the decree of the Assistant Collector. A second appeal was then preferred to the District Judge under section 180 of the Act with the result that the District Judge affirmed the decrees of the Courts below. The defendant thereupon appealed to the High Court. When the appeal came on for hearing a preliminary objection was taken that under the provisions of the Tenancy Act no third appeal lay under the circumstances to the High Court.

Babu *Jogindro Nath Mukerji*, for the appellant.

Mr. *M. L. Agarwala* (for whom Babu *Sital Prasad Ghose*), for the respondents.

STANLEY, C.J., and BURKITT, J.—The hearing of this appeal was referred by our brother Aikman to a Bench of two Judges, inasmuch as he had some doubt as to the propriety of the decision of our brother Richards in the unreported case of *Lachmi Narain* v. *Nirotam Das* (Second Appeal No. 256 of 1905, decided on the 3rd of July of the present year).† The question arises under these circumstances: Nirotam Das sued for arrears of rent in the Court of an Assistant Collector of the second class and obtained a decree. An appeal was preferred to the Collector under the provisions of section 176 of the North-Western Provinces Tenancy Act, Act II of 1901. On appeal the Collector

* Second Appeal No. 276 of 1905, from a decree of Sayid Muhammad Ali, District Judge of Mirzapur, dated the 12th of January 1905, confirming a decree of the Collector of Mirzapur, dated the 6th of September 1904.

(1) Weekly Notes, 1906, p. 251.

† Since reported, Weekly Notes, 1906, page 251.

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confirmed the decree of the Assistant Collector. A second appeal was preferred to the District Judge under section 180 of the Act, with the result that he also confirmed the decrees of the Courts below. Now an appeal from the decision of the District Judge has been preferred to this Court, and a preliminary objection is raised to the hearing of the appeal, namely, that no third appeal lies to this Court. The language of section 182 is as follows:—"A second appeal shall lie to the High Court from the decree in appeal of a District Judge in accordance with the provisions of Chapter XLII of the Code of Civil Procedure. It is contended on behalf of the appellant that the words "second appeal" as used in this section include a "third appeal" and that therefore the appellant is entitled to appeal to this Court. We are of opinion that this contention is not sound. The Legislature has used a word in the section which is clear and unequivocal, namely, "second," and we do not think we should be justified in giving to that word "second" a meaning which it does not possess, namely, "third." We must remember that an appeal is the creation of Statute, and no person is entitled to appeal unless the right to do so has been expressly given by Statute. We think that the expression "second appeal," as used in this section, is obviously of limited significance and does not include third appeals. It will be noticed that in the latter part of the section the words used are "from the decree in appeal of a District Judge" not "from the decree in appeal or second appeal of a District Judge." Under the Act, in cases which come before an Assistant Collector of the second class, an appeal is allowed first to the Collector and then to the District Judge. So in the case in which a suit which comes in the first instance before an Assistant Collector of the first class an appeal is given by section 177 to the District Judge and under section 182 to the High Court. We think that section 182 was intended to meet, and was confined to, suits which were instituted in the Court of an Assistant Collector of the first class or of a Collector, and was not intended to embrace suits instituted before an Assistant Collector of the second class, most of which are very petty in their nature; for example, there is involved in this appeal the sum of Rs. 5 odd only. We agree in the view which was taken by our brother Richards in the case to

which we have referred. We may point out that when the Legislature gave permission to institute a third appeal in an Act which was passed two days after Act No. II of 1901, namely, Act No. III of 1901, they used the expression "third appeal." We refer to section 213 of the Land Revenue Act. For these reasons we allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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LACHMI NARAIN v. NIRBTAM DAS.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

1906 *August* 14.

RAJ KISHORE (PLAINTIFF) v. DURGA CHARAN LAL AND OTHERS (DEFENDANTS).*

Hindu law—Hindu widow—Effect of relinquishment of estate by widow in favour of the present reversioners.

A Hindu widow in possession of a widow's estate in property of her deceased husband, a separated and childless Hindu, relinquished possession thereof to two persons who at the time were the next reversioners, they agreeing to pay her a maintenance allowance, but it did not appear that she intended to make them, if she could, full owners of the property, although certain incorrect recitals in the agreement entered into by the widow, when she gave possession of the property, might have lent colour to this suggestion. Both the persons thus put into possession predeceased the widow. *Held* that the nearest reversionary heir to the widow's late husband was entitled to succeed on the death of the widow.

Quære whether in these Provinces a Hindu widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate? *Behari Lal* v. *Madho Lal Ahir Gayawal* (1) and *Ramphal Ras* v. *Tula Kuars* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Munshi *Mangal Prasad Bhargava*, for the appellant.

Messrs. *A. E. Ryves*, and *W. Wallach*, and Munshi *Baribans Sahai*, for the respondents.

STANLEY, C.J., and KNOX, J.—The plaintiff appellant during the course of the hearing of this appeal abandoned his

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* Second Appeal No. 957 of 1904, from a decree of Lala Baijnath, Rai Bahadur, District Judge of Jaunpur, dated the 16th of June 1904, reversing a decree of Maulvi Syed Zainul-abdin, Subordinate Judge of Jaunpur, dated the 15th of March 1904.

(1) (1891) I. L. R., 19 Calc., 236. (2) (1888) I. L. R., 6 All., 116.

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claim to the grove, portion of the property sought to be recovered in the suit out of which this appeal has arisen. It has been found by the lower appellate Court upon an issue remanded to it by this Court that the ruined house in kasba Kirakat, also claimed in the suit, was not self-acquired property of Sheobakhsh Rai, and the claim to this house therefore clearly fails. The only property therefore now in dispute between the parties is a 6 anna 8 pie share in kasba Kirakat *khas* and a 6 anna 8 pie share in Chak kasba. These two shares had been the self-acquired property of Sheobaksh Rai, the husband of Musammat Sheobarna Kunwar. He died childless many years ago leaving his widow him surviving. At time of his death his presumptive heirs were his two nephews Rameshar Dayal and Sheoambar Lal, sons of his uncle Bhairo Dat. The defendant Durga Charan Lal is the grandson of Rameshar Dayal. After the death of her husband Musammat Sheobarna Kunwar made transfers in favour of several parties of portions of the property of her husband, including kasba Kirakat *khas*. In consequence of these transfers Rameshar Dayal instituted a suit to have the transfers set aside and for possession of the property, alleging that it was ancestral property which had belonged to Sewai Lal, the father of Sheobakhsh Rai, and that Sheobakhsh Rai had predeceased his father. It was decided in that suit that none of the transfers were made to meet a legal necessity and therefore that they should be cancelled, but that Musammat Sheobarna was entitled to retain possession of the property during her life. This we gather from the decree of the Subordinate Judge of Jaunpur, dated the 20th of April 1871, which has been filed in this case. Sheobarna Kunwar after the date of this order appears to have permitted Rameshar Dayal to hold possession of the property in dispute in this suit, which was half of the property owned by Sheobakhsh Rai in kasba Kirakat *khas* and Chak kasba, he paying her maintenance allowance, but there is no evidence before the Court to show what the arrangement was under which he was allowed so to enjoy the property. In a document dated the 15th of March 1872 whereby Musammat Sheobarna Kunwar gave up possession of the other half of the property in dispute to Sheoambar Lal, the father of the plaintiff, there is a recital that her husband was the owner of a 13 annas 4 pie share

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in kasba Kirakat *khas* and a 13 anna 4 pie share in Abdali by right of purchase and of shares in two other villages with which we are not concerned and that Musammat Sheobarna Kunwar was in possession of this property up to the date of the document. Then follows this recital :—"One half of this property has been decreed in favour of Lala Rameshar Dayal on the ground of right and proof of inheritance." Then follows a statement that Musammat Sheobarna Kunwar was an old and purdanashin lady and unable to do the work of the ilaka and that Shoambar Lal is entitled to it by right of inheritance and was prepared to bring a suit to enforce his right, and after these recitals she proceeded to give up her possession of this half of the property to Shoambar Lal and to put him into possession of it. The document contained a provision that out of the income of the property Shoambar Lal should, during the lifetime of Sheobarna Kunwar, give her in cash Rs. 31-8 per annum and the income of a market for one day in one month for her maintenance. This document was witnessed by, amongst others, Rameshar Dayal, who described himself as "the owner of the other half of the property." The recital in this document that one half of the property had been decreed in favour of Rameshar Dayal is not correct. As we have pointed out, by the decree of the Subordinate Judge of Kanpur of the 12th of April 1871 the transfers made by Musammat Sheobarna were declared to be invalid, but her life estate in the property was not interfered with, nor was one half of the property decreed in favour of Rameshar Dayal. This recital in the document of the 13th of March 1872 is also incorrect. Both Rameshar Dayal and Sheoambar Lal predeceased Musammat Sheobarna. She died on the 24th of October 1881, and upon her death the defendants, who were in possession of the property in dispute, refused to give up possession to the plaintiff, who admittedly was the nearest reversionary heir of Sheobaksh Rai at the death of Musammat Sheobarna. Hence the suit out of which this appeal has arisen.

The first Court decreed the plaintiff's claim in respect of the property now in dispute, but upon appeal the lower appellate Court reversed the decision of the Court below, holding that the plaintiff under all the circumstances had no right to the property

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In the course of his judgment the learned District Judge says:—"After the suit of 1871 the widow gave half the property in Kirakat to the plaintiff and he is in possession of it. The other half remained in possession of the defendant. During the widow's lifetime each of the parties let the property to tenants and recovered its rent as owner. The widow received maintenance from both. Therefore, although the property may have been the property of Sheobukhsh and went to his widow after his death, yet the parties by their own conduct treated it as if it belonged to Sewai Lal by right of survivership after the death of his son and allowed the widow to give half to one and put the other in possession of the other half. They cannot therefore recede from their own conduct now, and the plaintiff, who is in possession of the half, turn round and say that his half was limited to the widow's life-estate. It was on the contrary given to his father as he was about to sue for it in recognition of his right as reversioner, and the widow contented herself with a maintenance allowance as if it was the joint property of her husband and father-in-law. I therefore hold that the plaintiff has no right to sue."

We are of opinion that this decision is erroneous. If there were any evidence on the record to show that Musammat Sheobarna absolutely relinquished her life estate in the property in favour of Rameshar Dayal, we should have been bound to consider whether or not that relinquishment did not have the effect of accelerating the estate of Rameshar Dayal, who at the time was one of the two presumptive heirs of Sheobukhsh Rai. In the case of *Behari Lal* v. *Madho Lal Alhir Gayawal* (1), Lord Morris, in delivering the judgment of their Lordships of the Privy Council, observed:—"It may be accepted that according to the Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and de tooying her life-estate." In that case it was not necessary to decide this question seeing that it was held that as the widow retained possession for her own life of the property of her husband under the provisions of the ikrarnama under which she purported to relinquish it, she had not completely surrendered her estate and it did not therefore

(1) (1901) I. L. R., 13 Calc., 268.

become immediately vested in the grantee. In the judgment it is said:—"It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances." The position taken up by their Lordships of the Privy Council is in conflict with the rule laid down by a Full Bench of this Court in the case of *Ramphal Rai* v. *Tula Kuari* (1). In the course of their judgment, in that case, the learned judges, consisting of Straight, Oldfield, Brodhurst and Tyrell, JJ., said:—"We know of nothing in the Hindu Law to sanction the view that a person possessed of limited rights, such as those of a Hindu widow, can by uniting with one of many others having identical interests in expectancy on the happening of a certain event anticipate that event and convert such individual expectancy into an immediate absolute estate of full proprietorship. If this were permissible, it would virtually confer upon a Hindu widow the right of directing the succession to her husband's property in her lifetime when in law it only happens upon her death." It is unnecessary for us in the present case to determine whether the position assumed by the Judicial Committee in the case of *Bihari Lal* v. *Mudho Lal Ahir Gayawal* was intended as a recognition of the rule which undoubtedly prevails in the Calcutta High Court, inasmuch as we are unable to find on the record any evidence to establish that Musammat Sheobarna Kunwar ever made an absolute surrender of her life estate in favour of Rameshar Dayal. It would seem that by some arrangement Rameshar Dayal was permitted to hold possession of the property, he paying a certain allowance to Musammat Sheobarna for her maintenance. This falls far short of proving an absolute surrender of the life estate.

It was weakly contended that the plaintiff is estopped from maintaining the suit. This argument was based upon the document of the 13th of March 1872, on the fact that the plaintiff and his father took benefits under that document and on the fact that Rameshar Dayal was a witness to that document and in it described himself as owner of the property in dispute. We are unable to hold that these matters or any conduct

(1) (1883) I. L. R., 6 All., 116.

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on the part of the plaintiff or of his father Sheoambar Lal are, or is, such as to disentitle the plaintiff to maintain his claim.

Under these circumstances we think that the decision of the Court of first instance was correct. Raj Kishore was admittedly the nearest reversionary heir of Shobhaklish Rai when the inheritance opened up on the death of Musammat Sheobarna. We therefore allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance in regard to two properties mentioned in schedule B, namely, the shares in kasba Kirakat khas and in Chak kasba. In respect of the house in ruins in kasba Kirakat and the grove mentioned in the schedule to the claim the appeal fails. The proper order we think as to costs will be that the parties shall pay and receive costs in all Courts, according to failure and success. We order accordingly. The mesne profits awarded to the plaintiffs will be determined in execution.

Decree modified.

1906
June 28

Before Mr. Justice Banerji.

PARSOTAM NARAIN (DEFENDANT) *v.* CHHEDA LAL (PLAINTIFF).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 52, 86 *and* 87—*Lis pendens*—*Suit for foreclosure*—*Suit not terminated until decree absolute.*

A suit for foreclosure of a mortgage is not terminated until the passing of the decree absolute. A purchase, therefore, of the mortgaged property made after the passing of the decree *nisi*, but before such decree is made absolute, is subject to the doctrine of *lis pendens*. *Higgins* v. *Sloane* (1), *Chuman Lal* v. *Abdul Ali Khan* (2) and *Shivpuram Sadashivam Marwadi* v. *Waman Narayan Joshi* (3) followed. *Bellamy* v. *Sabine* (4) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellant.

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*Second Appeal No. 620 of 1901 from a decree of B. J. Dalal, Esq., District Judge of Mainpuri, dated the 4th of May, 1904, confirming the decree of Munshi Aziz-ur-Rahman, Subordinate Judge of Mainpuri, dated the 9th of February 1904.

(1) 2 Dr. and War., 356.
(2) (1901) I. L. R., 23 All., 331.
(3) (1897) I. L. R., 22 Bom., 939.
(4) (1857) 1 De G. and J., 566.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Madan Mohan Malaviya* (for whom Dr. *Tej Bahadur Sapru*), for the respondent.

BANERJI, J.—The facts of this case are somewhat complicated and are as follows:—

One Chhatarpat Singh was the owner of a 6¼ biswa share of zamindari. He had two sons, Kanhai and Gokul, who inherited his property in equal shares. Kanhai's sons were Makhan and Gandharp. Gokul had a son Badri who inherited his share of the property. Badri having died without issue, his half share passed to his mother, Musammat Dhan Kunwar.

The following mortgages of the property of Chhatarpat Singh were made by the different members of his family:—

(1) On 1st March 1889, Dhan Kunwar and Gandharp made a simple mortgage of 6¼ biswas in favour of Jagannath, father of the appellant, Parsotam Narain.

(2) On 8th July 1889, the same persons (Dhan Kunwar and Gandharp) made a mortgage by way of conditional sale of 4 biswas 13 biswansis in favour of one Nand Ram.

(3) On 8th August 1890, Dhan Kunwar and Gandharp made a simple mortgage of 2 biswas to Ganga Ram, who, on 10th June 1902, sold his rights as mortgagee to Parsotam Narain, appellant.

(4) On 16th September 1891, Gandharp and Makhan made a usufructuary mortgage of 6¼ biswas to one Jagannath, who was a different person from the mortgagee under the first mortgage.

Parsotam Narain brought a suit under the first mortgage of the 1st of March 1889, against the mortgagors, Gandharp and Dhan Kunwar. The latter having died during the pendency of the suit, Makhan was made a party as her legal representative. The subsequent mortgagees were also joined as parties. A decree for sale was passed on 11th May 1896 against all the defendants. Execution of the decree was taken out from time to time, but the mortgaged property was not sold.

Upon the second mortgage of 8th July 1889, a suit for foreclosure was brought by the heirs of Nand Ram against Gandharp and Makhan and the prior and subsequent mortgagees; and although the plaintiffs to that suit were mortgagees of 4 biswas and 13

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biswansis, they included in their claim the whole of the 6¼ biswas on the ground that they had offered to redeem the prior mortgage. A decree was made in their favour on the 20th of December 1901, for foreclosure in respect of the whole of the 6¼ biswas. This decree was assigned to Parsotam Narain, appellant, on 20th June 1902.

On 4th July 1902, Makhan sold his one-fourth share in the property amounting to 1 biswa and odd to the plaintiff, Chheda Lal.

On 9th July 1902, Parsotam Narain made an application for an order absolute for foreclosure under section 87 of the Transfer of Property Act, but did not make Chheda Lal a party. It does not appear that he had notice of the purchase by Chheda Lal. Makhan, however, was impleaded in the proceedings. On 6th September 1902, an order absolute for foreclosure was made in respect of 6¼ biswas, and on the strength of this order possession was taken and mutation of names was obtained by Parsotam Narain.

Thereupon the present suit was brought by Chheda Lal, the purchaser from Makhan, for possession of the share purchased by him. He offered to redeem the conditional sale in favour of Nand Ram, as also the first and third mortgages. The Court of first instance made a decree in his favour conditional upon his redeeming the first mortgage, and this decree has been affirmed by the lower appellate Court. Hence this appeal.

It is contended on behalf of the appellant that as the decree for foreclosure, passed on the 20th December 1901, related to the whole of the 6¼ biswas and has been made absolute, the property has vested absolutely in the appellant Parsotam Narain and the plaintiff has acquired no title to any part of it under his purchase. On behalf of the respondent it is urged that as the plaintiff had purchased Makhan's share before the application for an order absolute for foreclosure was made, that order is not binding on the plaintiff, and he has still the right to redeem the mortgage upon which the decree for foreclosure was passed. In answer to this contention the learned vakil for the appellant urges that the decree and the order absolute for foreclosure are binding on the plaintiff under the rule of *lis pendens*.

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There can be no doubt that if the plaintiff is bound by the order absolute for foreclosure he has acquired no title under his purchase and has no right to maintain the suit. That the decree *nisi* for foreclosure, passed on the 20th December 1901, is binding on him can admit of no doubt, as his purchase was of a date subsequent to the date of the decree and the decree was obtained against his vendor. The question to be determined therefore is whether the order absolute for foreclosure, passed against his vendor is equally binding on him. It is conceded that it would be binding if the purchase was made *pendente lite*. This leads to the question whether the *lis* terminated with the decree under section 86 of the Transfer of Property Act or continued till the final order was made under section 87.

By section 52 of the Transfer of Property Act, which formulates well known rules on the subject, *lis pendens* continues during the active prosecution of a contentious suit or proceeding; so that it terminates upon the final decision of the suit or proceeding. "But the *lis pendens* is not terminated where the decree does not put an end to the suit." (Sugden on Vendors and Purchasers, p. 760.) In Fisher on Mortgage it is stated on the authority of *Higgins* v. *Shaw* (1) that "a decree which is not final, as a decree to account, which puts no end to the matters in question, binds as *lis pendens*." (4th Edn., pp. 518, 519.) The same appears to be the law in America. Bennet in his work on Lis Pendens, observes that the decree or judgment to be final must be of "such a character as puts a conclusion to the matters in question in the suit. Interlocutory decrees or orders cannot have that effect, although they may purport to settle the rights of the parties. The Court, however, still would have power to modify or vacate them, and for all purposes of notice or binding force, *lis pendens* will continue notwithstanding such orders or decrees." (See Hukum Chand on the law of Res Judicata, p. 698.) It is thus clear that *lis pendens* continues until a final decree is passed in the suit. The decree under section 86 of the Transfer of Property Act in a suit for foreclosure is a decree *nisi* only and does not finally terminate the litigation. The right to redeem still subsists, and it is only when an order is made under

(1) De. and War., 366.

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section 87 that "the defendant and all persons claiming through or under him" are absolutely debarred of all right to redeem and the debt secured by the mortgage is deemed to be discharged. Until, therefore, an order absolute is passed under this section, it cannot, as it seems to me, be said that the litigation has terminated and that a final decree in the suit has been passed. This appears to be the law in America under which *lis pendens* continues until possession is delivered under the decree for foreclosure. It is stated in Bennet on Lis Pendens (p. 120) that "although it is true in a general sense, that *lis pendens* ceases with the rendition of judgment or entry of final decree, yet in the case of a foreclosure of a mortgage on real estate, it cannot be said that *lis pendens* ceases upon the making of the master's deed after sale under the decree. Where something remains to be done by the Court in the execution of its judgments and decrees, other than can be done without order of Court by the merely ministerial officers of the Court, *lis pendens* continues until this decree is executed. So in the case of the foreclosure of a mortgage it continues until the purchaser has been put into possession of the property". (Hukum Chund, p. 697, and Glose on Mortgages, 3rd Edn., p. 792.) To the same effect is the following observation in Van Fleet's Former Adjudication (Vol. II, p. 1098):—"In a foreclosure suit in equity the Court is not *functus officio* until the decree is executed by delivery of possession, and the *lis pendens* does not cease until that is done." In the analogous case of a decree under section 88 of the Transfer of Property Act, it was held by this Court in *Chunni Lal* v. *Abdul Ali Khan* (1) that such a decree being only a decree *nisi* and not a final decree, the suit in which it is passed does not terminate until an order absolute is made under section 89 and that a purchase made before the passing of an order absolute is a purchase *pendente lite*. The Bombay High Court held in *Shivjiram Sakharam Marwadi* v. *Waman Narayan Joshi* (2) that execution proceedings "give continuance to the *lis pendens*." Upon these authorities it must be held that the purchase made by the plaintiff in this case was a purchase *pendente lite* and he is bound by the order absolute for foreclosure made on 6th September 1902. It is urged on his behalf that as his purchase was made during the interval between

(1) (1901) I. L. R., 23 All., 331. (2) (1897) I. L. R., 22 Bom., 939.

the date of the decree under section 86 and that of the presentation of the application for an order absolute for foreclosure, it was made when no proceedings were pending, and therefore the rule of *lis pendens* does not apply to his case. The answer to this contention is that, although proceedings for an order absolute had not actually been instituted when the plaintiff made his purchase, yet as the suit did not terminate with the decree under section 86 but must be deemed to have continued till the making of the order absolute, the sale took place *pendente lite*. It is next argued that as the plaintiff by his purchase acquired the right of redemption and as he was not made a party to the proceedings relating to the order absolute, he was not foreclosed of his right of redemption, and it would be a great hardship to him were he to be deprived of his right of redemption in consequence of an order made in proceedings to which he was not a party. There is no doubt much force in this contention, but the principle upon which the rule of *lis pendens* is founded as laid down in *Bellamy* v. *Sabine* (1) is that there would be no certainty as to the termination of litigation if alienations pending a suit were allowed to prevail. As for hardship, it was the plaintiff's own fault that immediately after his purchase he did not pay off the amount of the mortgage, of which he undoubtedly had notice. In the present instance the six months allowed by the decree for payment of the mortgage money had expired long before the purchase of the property by the plaintiff. So that there can be no question of hardship in the case of the plaintiff. In *Qadir Bakhsh* v. *Jwala Prasad* (2) to which the learned vakil for the respondent has referred, the question of *lis pendens* was not raised or considered.

As for the above reasons the plaintiff must be held to have purchased the property in suit *pendente lite*, he is bound by the order absolute for foreclosure passed on the 6th of September 1902, and as that order vested the property absolutely in the appellant, the plaintiff has acquired no right to it and cannot maintain the suit. I accordingly allow the appeal, discharge the decrees of both the Courts below and dismiss the suit of the plaintiff respondent with costs in all Courts.

Appeal decreed.

(1) (1857) 1 De. G. and J., 566.

(2) S. A. No. 294 of 1902, decided on the 20th April 1904.

1903
June 28.

Before Mr. Justice Sir George Knox and Mr. Justice Aikman.

SHIB SABITRI PRASAD AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF MEERUT (DEFENDANT).*

Will—Separated Hindu domiciled in the United Provinces—Revocation of will—Evidence—Presumption

A separated Hindu residing at Meerut executed a will on the 20th of January 1885 and registered the same in the office of the District Registrar on the 22nd of January of the same year. The testator died on the 16th of October 1899. On the 8th of July 1902 a suit was instituted by certain persons, who claimed the property of the testator as his next of kin against the Collector of Meerut, who had taken possession of the property as trustee under the terms of the will for purposes therein set forth. The plaintiffs alleged that the testator had revoked the will of the 20th of January 1885, and tendered evidence to prove that on a certain occasion the testator had said that he had revoked his will. On the death of the testator the original will was not to be found, but, on the other hand, it was shown that persons interested in the disappearance of the will had had access to the house of the testator since his death.

Held that evidence that the testator had said that he had torn up the will was not admissible. *Stamer* v. *Stewart and Jones* (1), *Doe dem Shallcross* v *Palmer* (2) and *Keen* v. *Keen* (3) referred to.

Held also that the presumption of English law that, if a will is traced to the testator's possession and is not forthcoming at his death it has been destroyed by him, *animo revocandi*, would, at least, not be so strong in India as in other countries where wills are taken greater care of, and under the circumstances disclosed by the evidence in the present case did not arise at all. *Podmore* v. *Whatton* (4), *Finch* v. *Finch* (5) and *Brown* v. *Brown* (6) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, Babu *Durga Charan Banerji* and Mr. *Shams-ud-din*, for the appellants.

Mr. *A. E. Ryves*, for the respondent.

KNOX and AIKMAN, JJ.—This appeal arises out of a suit brought by the plaintiffs, who are appellants here, to recover possession of property, movable and immovable, of the value of upwards of Rs. 6,00,000. The property belonged to one Nanak Chand, a Brahman residing in Meerut, who died on the 16th of October 1899. He left him surviving his widow named Musammat Champa, who died at Calcutta on the 9th of March 1900. He

* First Appeal No. 4 of 1904 from a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 18th of September 1903.

(1) (1851) 2 Sw. and Tr., 320.
(2) (1851) L. R., 16 Q. B., 757.
(3) (1873) 3 P. and D., 105.
(4) (1904) 3 Sw. and Tr., 449.
(5) (1867) L. R. and D., 371.
(6) (1858) 8 E. and B., 876.

left no issue. The plaintiffs are the grandsons and great-grandsons of one Kishan Sahai, the paternal uncle of Nanak Chand, and claim to be entitled to his estate as reversioners. On the 20th of January 1885 Nanak Chand executed a will, which is printed at page 72 of the respondent's book. He was then in the 23rd year of his age. By this will he left his property, subject to an allowance of Rs. 100 a month to any widow he should leave behind, in trust to the District Judge, and, if he should decline to act, to the Collector of the district. By paragraph 8 of the will he declared that ¼ of the income of his estate should be spent in charity, namely, in the distribution of food among travellers, faqirs, and devotees, and in assisting the needy. He states that it is not his object that such persons as are healthy and habitually carry on begging as a profession and dislike to do work should be assisted. By paragraph 9 another ¼ of the income of the property is devoted to the assistance of friendless people and widows of respectable families who would feel it a disgrace to ask openly for relief, and to other matters of public utility. By paragraph 10 of the will the remaining ½ of the income is directed to be applied to the construction of a school to be called "The Nanak Chand Anglo-Sanskrit School" for teaching English, Sanskrit, Nagri and Urdu to students of all castes and creeds, preference being given to Hindu boys. The will provides that if the testator should leave a son, the whole of his property should go to him and he reserves to himself the right to adopt a son. The will provides that only in the event of the testator leaving neither a begotten nor an adopted son is the property to go to the District Judge. The will also makes provision for any daughters that he might leave. In paragraph 1 of the will the testator says that he has long been living separate and has up to that moment been separate from the descendants of his uncle Lala Kishan Sahai. This will was witnessed by no less than twenty-eight witnesses, and it was presented for registration, and duly registered by the District Registrar Mr. Harrison on the 22nd January 1885. The original will is not forthcoming, but an authenticated copy of it, taken from the transcript made of it in the District Registrar's book at the time of registration, is on the record. The District Judge having declined to administer,

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the Collector of Meerut took possession of the estate a few days after the death of Musammat Champa. The present suit was instituted against the Collector on the 8th of July 1902, and it was dismissed by the learned Subordinate Judge on the 10th of November 1903. The case of the plaintiffs is that Nanak Chand owing to his displeasure with the other members of his family executed the will, but that before his death he became reconciled to them and increasingly fond of his wife Musammat Champa; that he accordingly changed his intentions about his property, and cancelled the will mentioned above in order that his estate might devolve upon his heirs in the ordinary course of inheritance. How and when the will was cancelled the plaint does not state. In paragraph 11 of the plaint it is stated that the will "was declared to be invalid and ineffective by means of cancellation made in clear words." It is alleged that Nanak Chand having cancelled his will died intestate, and that his estate devolves on the plaintiffs as reversioners. Another plea put forward by the plaintiffs is that at the time when the will was executed Nanak was member of a joint Hindu family, to which they belonged, and that the will is consequently invalid. The defence was that Nanak Chand was separate from the members of his family for a considerable time before the execution of the will, that he was the sole owner of the property bequeathed by him and that the will was never cancelled.

The great bulk of the voluminous evidence, both oral and documentary, which has been adduced in the case, was directed to the issue as to whether Nanak Chand was or was not separate from the rest of his family at the time he made his will. The other main issue in the case was whether he had revoked the will. On both these issues the lower Court found in favour of the defendant. In the memorandum of appeal to this Court eight pleas are put forward. The last two were not pressed by the learned advocate for the appellants, the remaining six pleas relate to the two issues set forth above. The first, second and third have reference to the issue as to whether Nanak Chand was at the time he made the will a member of the joint undivided Hindu family. If it were necessary to decide this issue we should not have much difficulty in agreeing with the Court below

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in its finding. Nanak himself distinctly says in his will that he was separate at the time he made his will, and there is a mass of evidence in support of his assertion. But in our opinion this issue is not at all material to the case. It is admitted that Nanak did separate from the rest of his family in 1886 and that he was separate when he died. Having regard to this admitted fact the contention on behalf of the plaintiffs that, assuming that he was joint at the time of the will, the will is thereby invalidated, cannot in our judgment be sustained. The rule enacted in 1 Vict., Cap. XXVI, section 24, namely, that a will is to be construed as speaking and taking effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will, has been embodied in the Indian Succession Act, 1865, section 77. That section has been incorporated in the Hindu Wills Act of 1870. It is true that this Act does not extend to these Provinces; but we see no reason whatever why the principle should not be held applicable to the case before us. We hold therefore that, even if it had been shown that Nanak Chand was joint at the time when he made the will, the will must be construed as speaking and taking effect with reference to the state of things in existence immediately before the testator's death, when admittedly he had separated from the members of his family. This disposes of the first three grounds of appeal.

The 4th, 5th and 6th grounds refer to the issue as to whether the will had been revoked by Nanak before his death. It may be mentioned here that it appears from the pleadings that on the 9th of November 1899, a will purporting to have been executed by Nanak on the 14th October 1899, that is, two days before his death, was presented for registration by one Ram Sarup on behalf of the widow Musammat Champa. Registration of this was refused, and we are informed that it is common ground that the will propounded by Ram Sarup was a forgery. We have no information as to what were the contents of this forged will, or as to the grounds on which it was refused registration, the documents relating to it which were filed with the plaint having been returned to the plaintiffs.

The will of the 20th January 1885 is no longer forthcoming, and the case for the plaintiffs is that it was torn up by Nanak

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Chand himself. The plaintiffs also rely upon the presumption which is set forth in many English authorities, namely, that if a will is traced to the testator's possession and is not forthcoming at his death, it has been destroyed by him *animo revocandi*.

The evidence adduced by the parties, and particularly by the defendant, relating to this issue is singularly meagre when compared with the mass of evidence adduced in regard to the other question as to whether Nanak Chand was joint or separate when he made his will.

For the plaintiffs eight witnesses were examined to prove that, on four different occasions, Nanak said that he had torn up his will. In the case *Staines* v. *Stewart and Jones* (1) a witness was produced to prove that on a certain occasion the deceased said that he had made a will but he had destroyed it. It was objected that this evidence was inadmissible. Sir C. Cresswell, after referring to Lord Campbell's observations in *Doe dem. Shallcross* v. *Palmer* (2) said:—"If the declaration of a testator that he had revoked a certain will by a subsequent will could not be received, on what ground could the declaration that he had revoked it in any other manner be received," and he accordingly sustained the objection that the evidence referred to above was inadmissible. In a later case *Keen* v. *Keen* (3) it was, however, held by Sir J. Hannen that "a statement by a testator that he had altered his mind as to the disposition of his property and that he had therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is evidence of intention from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion." In the present case we have no evidence to prove the actual destruction of the will. The only evidence adduced is that the testator *said* that he had destroyed the will, and there is, we think, in this case an entire absence of evidence of other circumstances leading to the same conclusion. The evidence of the eight witnesses referred to above has not been believed by the learned Subordinate Judge, who had an opportunity of seeing the witnesses and noting their demeanour. We have carefully read that evidence, and we must say that it carries no conviction to

(1) (1801) 2 Sw. and Tr., 320. (2) (1851) 16 Q. B., 757.
(3) (1873) 3 P. and D., 105.

our minds. As found by the learned Subordinate Judge, it was in the highest degree unlikely that a wealthy man like Nanak Chand in the prime of life should have had such difficulty as is referred to by the witnesses in finding a wife From the evidence of Prasadi Lal of Khurja, one of the witnesses called for the plaintiffs, it appears that the motive which Nanak had for tearing up his will was that it was an obstacle to his getting married. That is not the reason assigned in the plaint, which attributes the cancellation of the will to the reconciliation between Nanak and his relations. In our opinion there is no reliable evidence of any such reconciliation. Nanak Chand, a witness for the defendant, whose house is in the same mohalla as that of Nanak, deposes that he saw no renewal of friendly relations between Nanak and the plaintiffs up to the time of Nanak's death. The evidence for the plaintiffs in our judgment entirely fails to prove that Nanak revoked his will.

On behalf of the plaintiffs, however, reliance is placed on the presumption of English law referred to above. The learned Subordinate Judge doubts whether that presumption would be applicable in this country. We are disposed to think that in India the presumption from a will not being forthcoming would at least not be so strong as in other countries where wills are taken greater care of. On the facts appearing in the evidence, however, we doubt whether, if this were an English case, the presumption referred to would arise Nanak, as we have said above, died on the 16th of October 1899. His widow was at that time absent from home residing with a connection in the town of Anupshahr in a different district. It appears from the evidence of Sis Ram, a witness for the plaintiffs, that the plaintiff Sri Newas and others quarrelled about the property and put up locks on the house. Musammat Champa afterwards came and took possession. There is no evidence whatever to prove that a search for the will was made by any responsible person when Nanak died, and that it was not forthcoming at his death. This being so, does the presumption as of the revocation to the will arise? We think that on the facts it does not. In the case *Podmore* v. *Whatton* (1) Sir J. P. Wilde says:—"The will having been thus

(1) (1864) 3 Sw. and Tr., 449.

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made, the next and most important question is—what became of it? On the part of the plaintiff it was urged that this was an enquiry upon which the Court was not bound to enter; that the will thus made could only be revoked by the specific methods indicated in the Wills Act, and that unless the defendant established its revocation the Court was bound to pronounce it unrevoked and admit it to probate. On the part of the defendant it was argued that as the will itself was not forthcoming and had been last seen in the custody of the testatrix, the law must presume that she had herself revoked it. The Court cannot accede to either of these views. A material question of fact has to be decided in this case before any pre-sumption arises on either side, and it is this, was the will found at the decease of the testatrix or not? If it was found at her death and in an unmutilated state, then she did not revoke it. If it was not so found then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases the solution of this question presents no difficulty, for the depositories of the deceased are duly searched by those whose good faith is not impugned and who vouch for the fact one way or another." But in the present case it is far otherwise. There is not shown to have been any search by any responsible person for the will when Nanak died. His house was in the possession of those whose interest it would be to get rid of the will. It was not till nearly five months after the death of Nanak that the Collector took possession.

In *Finch* v. *Finch* (1) Sir J. P. Wilde, after referring to the passage cited above from *Podmore* v. *Whatton*, says:—"But that difficulty does present itself in the present case, for the depositories of the deceased before they could be searched by any independent person were clearly accessible to, and are proved in evidence to have been investigated by the only person who was interested in destroying the will if it existed." At page 374 of the same judgment the learned Judge says:—"It is enough that the Court is satisfied that there is no proof that this will was not found in the depositories of the testator. It is the non-existence of the paper at the time of death which leads to the legal

(1) (1867) 1 P. and D., 371.

presumption of revocation." In the case *Brown* v. *Brown* (1) Lord Campbell, C.J., at page 884, says:—"Certainly the fact of the will being last traced to the possession of the testator and not being found is not conclusive that he cancelled it. If, for instance, it could be shown that the heir at law had access to the place where the testator had deposited the will, and grounds could be shown for a suspicion that he had destroyed it, it would be a case to consider." Having regard to what was said in the cases cited above, we are of opinion that the facts established in this case are not such as to raise a presumption of revocation.

For the defendant evidence was called to prove the existence of the will after the time when, according to the plaintiffs' witnesses, Nanak said he had destroyed it, and one witness Murli Mahajan says that he saw the will in January or February following Nanak's death. The learned Subordinate Judge distrusts this evidence for the defendant. He may be right in his view as to the credibility of this evidence for the defence. But even if it is not believed, we think that the plaintiffs' case must fail. It is proved beyond any doubt that Nanak did execute the will under which the respondent has taken possession. In our judgment it is not proved, and no presumption arises that it was ever revoked. We consider it unlikely that Nanak, his relations with the family being what they were, should have destroyed the will and not executed another. If the case now set up for the plaintiffs is true, the destruction of the will must have been well known, not only to them, but also to Musammat Champa; and if they knew that the will had been destroyed, it is difficult to understand why an application was not made for mutation of names in the revenue records in favour either of Musammat Champa or of the plaintiffs. On a review of all the evidence and of the authorities we have no hesitation in coming to the conclusion that the appeal must fail.

In our opinion the respondent has printed a considerable mass of documentary evidence which was unnecessary. We may refer to the long list of biddings at the sale of movable property. Having regard to this we only allow the respondent four-fifths of the costs incurred by him in printing and translation in this

(1) (1858) 8 E. and B., 876.

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Court as we do not think it right that the appellants should be saddled with the whole of these costs. We dismiss the appeal. The respondent, subject to the above exception, will have the costs of this appeal.

Appeal dismissed.

1906
July 24

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustamjee.

JUGAL KISHORE (PLAINTIFF) v. FAKHR-UD-DIN AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), section 19—Limitation—Acknowledgment of title—By whom such acknowledgment may be made.

Section 19 of the Indian Limitation Act, 1877, does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made at the time when the acknowledgment was given: it prescribes that, if, before the period of limitation expires, an acknowledgment of liability or right has been made in writing signed by the parties against whom the property or right is claimed, a new period of limitation will be computed from the time of the acknowledgment. *Jagabandhu Bhattacharjee* v. *Harimohan Roy* (1) referred to.

THIS was a suit brought for partition of a house of which the plaintiff claimed to be part owner. The plaintiff's title was by purchase at a sale in execution of a decree, on the 18th of August 1890, of 14 sihams of the house in suit. On the 29th of March 1898, the plaintiff obtained formal possession of the share purchased, but actual possession was not delivered to him, and he had never been in actual possession of the house or any part of it. To save limitation the plaintiff relied upon an admission made by Alim-ud-din, one of the defendants, in a suit for pre-emption brought against Jugal Kishore in 1902. In the plaint in that suit Alim-ud-din stated that Raghubar Dayal had bought 28 sihams in execution of the money decree obtained by Jugal Kishore and further that Jugal Kishore had purchased 14 sihams under the mortgage decree obtained by Jafar Khan. The Court of first instance (Subordinate Judge of Bareilly) gave the plaintiff a decree against Alim-ud-din only for 6 sihams. On appeal,

* Second Appeal No 391 of 1905, from a decree of E. O. E. Leggatt, Esq., District Judge of Bareilly, dated the 18th of January 1905, reversing the decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 29th of June 1904.

(1) (1895) 1 C.W.N., 569.

however, the District Judge, refusing to accept the admission made by Alim-ud-din as operative to save limitation, reversed the Subordinate Judge's decision and dismissed the suit in its entirety. The plaintiff thereupon appealed to the High Court.

Mr. *W. Wallach* and Munshi *Govind Prasad*, for the appellant.

Mr. *B. E. O'Conor* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C.J., and RUSTOMJEE, J.—This is an appeal against a decree of the District Judge of Bareilly dismissing the plaintiff's claim on the ground that the same was barred by limitation. The suit was brought for partition of a house of which the plaintiff claimed to be part owner. The Court of first instance decreed the plaintiff's claim in part, holding that he was entitled to 6 out of 40 sihams of the property in question. On appeal this decision was reversed on the ground of limitation. It appears that the plaintiff has never been in actual possession of the property, but he relied upon an acknowledgment of his right to a share in it made by the defendant respondent, Alim-ud-din. On the 18th of August 1890, in execution of a decree 14 sihams of the house in question were sold to Jugal Kishore, and on the 29th of March 1893, he obtained formal possession of the share, but actual possession was not delivered to him. His suit would apparently be barred by limitation were it not for the fact that an acknowledgment of his title was made by the defendant, Alim-ud-din in a suit for pre-emption brought by him against Jugal Kishore in the year 1892. In the plaint in that suit Alim-ud-din stated that Raghubar Dayal had bought 28 sihams in execution of a money decree obtained by Jugal Kishore and became owner of 28 sihams. The learned District Judge held that this statement was not an admission of liability within the meaning of section 19 of the Limitation Act; that in the first place it was an admission only as to 14 sihams so far as Jugal Kishore was concerned, but in the second place Alim-ud-din was not a person who could make an acknowledgment of liability, for he could have no interest in the property in the life time of his father, Ilahi Bakhsh, who did not die till the year 1896. We think the learned Judge was wrong as to this. Section 19 does not require that the person making an acknowledgment should

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have an interest in the property, in respect of which the acknowledgment was made at the time when the acknowledgment was given; it prescribes that if, before the period of limitation expires, an acknowledgment of liability or right has been made in writing, signed by the parties against whom the property or right is claimed, a new period of limitation will be computed from the time of the acknowledgment. The claim in this case is for partition, and Alim-ud-din, who made the acknowledgment, is part owner of the property sought to be partitioned. It does not lie in his mouth, we think, to set up the bar of the Statute of Limitation. A question arising under section 19, which has a close bearing upon the question before us, was decided in the case of *Jagabandhu Bhattacharjee* v. *Hari Mohan Roy* (1). In that case in a petition to compromise the plaintiff's title to certain lands was admitted by the defendants, and it was held that the petition of compromise was substantially an admission by the defendants that the plaintiffs were proprietors of the lands claimed by them. We think that the appeal ought not to have been dismissed on the ground that the suit was barred by limitation. We do not profess to decide whether the plaintiff is entitled to any share in the house in question or the right of any of the parties. It will be for the plaintiff to establish his title if he can do so. All that we hold is that in view of the acknowledgment given by Alim-ud-din, it cannot be said that the plaintiff's right to have his case investigated and considered is barred. We therefore set aside the decree of the lower appellate Court, and inasmuch as that decree was based upon a ruling on a preliminary point, a ruling with which we do not agree, we remand the case to that Court with directions that it be restored to the file of pending appeals in its proper number and be disposed of on the merits. The costs of this appeal as also the costs in the Courts below will abide the event.

Appeal decreed and cause remanded.

(1) (1895) 1 C. W. N., 569.

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July 27.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Rustomjee

DURGA DEI (PLAINTIFF) v. BALMAKUND AND ANOTHER (DEFENDANTS) *

Hindu Law—Joint Hindu family—Partition—Effect of partition of family property between two branches of the family without specification of individual shares of one branch

By an award the property of a joint Hindu family consisting of an uncle and two nephews was partitioned, one share being allotted to the uncle and one to the nephews, but nothing was said as to the shares to be taken by the nephews individually nor did they express any desire to separate. *Held* that the presumption was that the share of the nephews still continued to be joint property so far as they were concerned. *Balkishen Das* v. *Ram Narain Sahu* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Benî Madhab Ghose* and Babu *Harendra Krishna Mukerji*, for the respondents.

STANLEY, C.J., and RUSTOMJEE J.—This appeal arises under the following circumstances:—One Kishan Prasad was at the time of his death possessed of considerable movable and immovable property. He had two sons, namely, Banke Bihari, who predeceased his father, and Ram Ratan. Banke Bihari left two sons, namely, Lal Bihari and Chhail Bihari. The plaintiff, Musammat Durga Dei, is the widow of Lal Bihari, who is dead. Lal Bihari had a son named Kishna Murari, who is also dead. In the year 1896, the then surviving members of the family, namely, Ram Ratan and his nephews Lal Bihari and Chhail Bihari, entered into an agreement whereby they left it to arbitrators to divide the assets of Kishan Prasad in any way they might think fit. It would appear that Ram Ratan was desirous of having a definite share allotted to him and of separating from his nephews. An arbitration award was drawn up whereby the immovable property was divided into two shares and one share allotted to Ram Ratan and the other share to the two brothers, Lal Bihari and Chhail Bihari. Neither in the agreement to refer the matter to arbitration nor in the award is there

* Second Appeal No. 770 of 1905 from a decree of A. W. Trotman, Esq., District Judge of Cawnpore, dated the 6th of July 1905, confirming the decree of Babu Bepin Behari Mukerji, Subordinate Judge of Cawnpore, dated the 30th of July 1904.

(1) (1903) I. L. R., 30 Calc., 778.

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any indication that Lal Bihari and Chhail Bihari ever desired or intended that shares in severalty should be allotted to them. In the award they are treated as the members of one branch of the family and one share is allotted to them as such, the other share being allotted to their uncle, Ram Ratan, who represented the other branch of the family. On the death of Lal Bihari, Chhail Bihari was recorded as the owner of the property allotted to the two brothers and he purported to deal with it as owner and executed a mortgage in favour of one Balmakund. Balmakund instituted a suit on foot of his mortgage and obtained a decree for sale. Thereupon, the plaintiff, the widow of Lal Bihari, claimed Lal Bihari's share of the property as heir of her deceased son and objected to the execution of the decree as against that share. Her objection was disallowed and thereupon the suit out of which this appeal has arisen was brought by her for a declaration of her title to the share which, she alleges, her husband possessed in the property. Both the lower Courts have dismissed the claim, holding that Chhail Bihari and Lal Bihari were joint owners of the property allotted to them by the award and that upon the death of Lal Bihari, Chhail Bihari became absolutely entitled to it by survivorship. It is contended before us, on the strength of recent rulings of the Privy Council, that there was a separation of the joint family property on the occasion of the division of the property, and that Ram Ratan, the uncle, having become separate and having had a definite share of the joint property allotted to him, it must be presumed that Lal Bihari and Chhail Bihari became tenants in common of the share which was allotted to them by the award, and were not joint tenants. Their Lordships of the Privy Council in the case of *Balkishen Das* v. *Ram Narain Sahu* (1), decided that where an *Ikrarnama* executed by the members of a joint family stated in unambiguous terms that defined shares in the whole of the joint property had been allotted to the several co-parceners, notwithstanding that liberty was given by it to any of the parties either to live together as members of the joint family as before or to separate his own business, the effect of the deed was to cause a separation in estate and interest between all the co-parceners. In that case it will be

(1) (1901) I. L. R., 30 Calc., 78.

observed that the *ikrarnama* in unambiguous terms stated that definite shares in the entire family property had been allotted to the several co-parceners. This is unlike the award and agreement which is relied upon in the present case as establishing a separation in interest between the two brothers Lal Bihari and Chhail Bihari. Here the agreement did not provide that definite shares should be given to them. The arbitrators were to allot the property between them and their uncle as they might think fit. In the award definite shares were not given to them, but one share was given to both. In view of this and of the evidence which shows that Lal Bihari and Chhail Bihari continued as joint tenants up to the death of Lal Bihari, we are satisfied that there never was an agreement between the two brothers to become separate. We think that the view taken by the Courts below was therefore correct. We accordingly dismiss the appeal. The appellant must pay the costs of the respondent, Balmakund, the original defendant in the suit. The other respondent must abide his own costs.

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Appeal dismissed.

PRIVY COUNCIL.

P. C. 1906, *November* 1, 5, *December* 14.

IN THE MATTER OF SASHI BHUSHAN SARBADHICARY.

[On appeal from the High Court of Judicature, North-Western Provinces, Allahabad.]

Advocate—Power of High Court to deal with advocate who is also a member of the English Bar—Constitution of Bench of High Court under Rules of Court—Rules 2, 180, 181, 197—*Letters Patent, clauses* 7 *and* 8—*Advocate charged with misconduct—Libellous article written by advocate in newspaper edited and published by himself—Contempt of Court—"Reasonable cause" for suspension.*

The High Court at Allahabad is not precluded from dealing under the Letters Patent of the Court with an advocate of the Court for misconduct by reason of his being a member of the English Bar.

By rule 2 of the High Court rules a Bench of three Judges of the Court is a tribunal properly constituted to deal with a charge of misconduct made against an advocate of the Court. Rule 197 does not make a Bench of five Judges necessary in such a case, but only provides for cases in which the High Court may for good cause and without charge or trial suspend or remove from the roll any advocate of the Court.

Present:—Lord DAVEY, Lord ROBERTSON, Sir ANDREW SCOBLE, AND Sir ARTHUR WILSON.

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After an altercation during the hearing of a case with one of the Judges of the High Court, in the course of which he alleged that he had been told by the Judge to "hold his tongue" and to "sit down," an advocate of the Court attempted to defend his conduct by publishing in a newspaper, of which he was the editor, an article which was a libel reflecting not only on the Judge before whom he had appeared but upon other Judges of the Court in their judicial capacity, and in reference to their conduct in the discharge of their public duties, and which amounted to a contempt of Court which might have been dealt with as such by the High Court. *Held* that such publication constituted under clause 8 of the Letters Patent of the Court "reasonable cause" for an order suspending the advocate from practising.

Such publication was not excusable on the ground that it was written in his capacity as editor of the newspaper and not in his capacity as an advocate. The controversy arose from the misbehaviour of the advocate conducting a case before the Court, and the contempt of which he was found guilty was committed in the attempt to vindicate his professional conduct in a publication for which he was solely responsible. *In re Wallace* (1) distinguished.

APPEAL from an order (July 5th, 1906) of the High Court at Allahabad whereby the appellant was suspended for four years from practice as an advocate.

The order and the circumstances which led to its being made are set out in the judgment of the High Court (SIR GEORGE KNOX, P. C. BANERJI, and R. S. AIKMAN, JJ.) giving their reasons for making the order, which was as follows :—

"Notice was served upon Mr. Sarbadhicary, an Advocate of this Court, to show cause why his name should not be removed from the Roll of Advocates of this Court or such other order passed as to the Court shall seem meet.

"The cause which led to the issue of this rule was that, under date June the 1st, 1906, a publication appeared called *The Cochrane*. It contained an article entitled 'Honourable High Court.' To the publication is appended a footnote to the effect that it is 'printed by A. Gani and published by Mr. Sarbadhicary, Barrister-at-law.' In the rule which issued it is set out that this publication contains scandalous and unbecoming remarks in reference to certain Judges of this Court before whom Mr. Sarbadhicary practises, and that in publishing the said paper Mr. Sarbadhicary has been guilty of conduct unworthy of a barrister.

(1) (1866) L. R., 1 P.C., 288.

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"In showing cause the Advocate concerned began by taking exception to the jurisdiction of the Court. He contended that section 8 of the Letters Patent of the 17th of March, 1866, gave the Court no power over barristers and that the advocates contemplated by section 8 were only those advocates whom this Court might by rule 183 of the Rules of Court admit to the Roll of Advocates. But that the contention has been raised, it would seem hardly necessary to answer it.

"Section 7 of the Letters Patent in express words authorizes and empowers this Court to approve, admit and enroll such advocates as to them may seem meet. Section 8 gives the Court power to make rules for the qualification and admission of proper persons and empowers the Court to remove or suspend from practice on reasonable cause advocates so enrolled. Under the power so given the Court has made a rule, rule 180, permitting barristers of England or Ireland to present an application for admission to the Roll of Advocates. Even so, no barrister has, merely by reason that he has been called to be a barrister, the right to expect that his application will, as a matter of course, be granted. Rule 182 provides that the application be considered by the Chief Justice and Judges present for the time being in Allahabad and thereupon they may, if they think fit, order that the applicant be admitted to the Roll of Advocates of this Court. Moreover, the concluding words of section 8 effectually dispose of this objection. They are as follows:—

'No person whatsoever but such advocate' (*viz.* an advocate admitted under Rule of this Court) 'shall be allowed to act or plead for or on behalf of any suitor in the said High Court.' The right of any barrister to appear in this Court rests upon his being admitted to the Roll of Advocates of this Court and not upon his being called to the Bar.

"We overruled this objection.

"The Advocate concerned then argued that, under rule 197 of the Rules of the Court, his case must be tried by the Chief Justice and Judges present for the time being in Allahabad. We overruled this objection also. Rule 2 empowers a Bench of three Judges to hear and decide all charges against advocates in respect

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of professional or other misconduct for which an advocate may be removed or suspended from practice. Rule 197 provides for cases in which the Chief Justice and Judges may for good cause and without charge or trial suspend or remove from the roll of Court any advocates of the Court. The rule has no application to the case before us.

"The Advocate concerned next attempted to justify the matter which appeared in *The Cochrane* under date June the 1st, 1906. The line of argument which he adopted was that (1) what he had set out therein was set out by him in his capacity of editor and not in his capacity of advocate of this Court; (2) that what was contained in the paper were mere opinions expressed in all honesty by an editor without malice and with a view to correct errors; (3) that nothing had been said in a contemptuous way, and (4) that the only misconduct of which this Court could take notice was misconduct on his part with reference to clients.

"We shall first deal with the last two of these contentions.

"A very similar contention was put forward in *In re Weare* (1) and brushed aside by Lord Esher with the following remarks:—

'It is argued that if an offence committed by a solicitor is not an offence in his character as a solicitor, or having relation to his character as a solicitor, then, however monstrous it may be, the Court has not authority to strike him off the rolls, because the act is not done in his capacity as a solicitor. That would seem to me to be a very strange doctrine, if it were true, that a person convicted of a crime however horrible must, if it be not connected with his professional character, be allowed by the Court still to be a member of a profession which ought to be free from all suspicion.' The offence in this case was a personally disgraceful offence.

"We know of no authority, and the advocate concerned has referred us to none, to show that this misconduct intended by rule 2 bears the limited meaning which he seeks to put upon it. Section 8 of the Letters Patent empowers the Court to remove and suspend upon 'reasonable cause,' words which have a much wider range than mere misconduct. It is wholly unnecessary for

(1) (1893) 2 Q. B. D., 489.

us to point out that the profession of an advocate is an honourable profession, and that this Court is concerned in seeing that those who are on the roll of advocates maintain by their acts and conduct not merely the honour of the body to which they more immediately belong, but also the honour of the Court of which by reason of their enrolment they form an integral part. Any act which tends to discredit or bring into contempt the order of advocates of the Court amounts to misconduct of which this Court can take notice. Acts which on the part of a private individual offend against the dignity or are calculated to prejudice the course of justice and are in his case contempts of Court, do not cease to be acts of misconduct because they are committed by an advocate. Rather are they aggravated, inasmuch as the advocate is bound to uphold and maintain the dignity of the Court. Acts which scandalize the Court as libels on its integrity, or the integrity of its Judges, officers and proceedings, are all instances of such misconduct. [*Ex parte Turner* (1); *Reg.* v. *Castro* (2)]. A case very much in point is the case of *Lechmere Charlton* (3). In that case Mr. Lechmere Charlton, a barrister, sought (as the attempt has been made in this case) to distinguish a letter, written after a case was concluded, reflecting upon the conduct of a Master in Chancery as being both unexpected and inexcusable, and couched in threatening terms, as an act done by him not as a mere barrister, but as a gentleman. He maintained that he had a right to ask (or what would become, he said, of the boasted independence of the British Bar?) 'if a counsel thus insulted, tricked and defeated is not to be allowed to complain of the deception that has been practised upon him in the manner that one gentleman usually complains of the ill-treatment that he has received from another, without being hoisted up for the contempt of a superior Court, and an upright and enlightened Judge.' He freely declared that he harboured no sort of ill-will towards Master Brougham, that it was of his judicial conduct alone that he complained and which he hoped would have been corrected. Lord Chancellor Cottenham in giving judgment held that 'every writing, letter or publication, which has for its object to divert the

(1) (1844) 3 Mont., D. and D., 523. (2) (1873) L. R., 8 Q. B., 219.
(3) (1836) 2 Mylne and Cr., 316.

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course of justice, is a contempt of the Court. It is for that reason that publication of proceedings which have already taken place, when made with a view of influencing the ultimate result of the cause, have been deemed contempts. It would be strange, indeed, if the Judges of the Court were the only persons not protected from libels, writings and proceedings, the direct object of which is to pervert the course of justice. Every insult offered to a Judge, in the exercise of the duties of his office is a contempt; but when the writing or publication proceeds farther, and when, not by inference, but by plain and direct language, a threat is used, the object of which is to induce a judicial officer to depart from the course of his judicial duty and to adopt a course he would not otherwise pursue, is a contempt of the very highest order.'

"The advocate concerned not only admits, but attempts to justify, the following passages in *The Cochrane* of the 1st of June, 1906:—

I. 'For the Chief Justice is in the potestas of that gentleman who sits with him. The non-Chief Justice proposes, and the Chief Justice dittoes. One day when he had to act alone, knowing, we believe, his talent was not adequate, he invited Mr. Justice Burkitt and thus he sat and Sir William Burkitt worked for him. This was objected by the Counsel. So our Honourable Chief Justice was angry. Had our Honourable gentleman been as independent as his predecessors, respectively, Sir John Edge and Sir Arthur Strachey, he would have never openly taken help. Another instance of his dependence was that he is not confident of his ability. For when he writes a judgment he sends it to another Judge for correction who examines. We had shown to our readers an instance in which the Chief wrote a letter to Mr. Blair, stating that he sent a judgment to him and requested him that he should correct the judgment, insert proper words, and then return it to him. Thus helped as he is, he must give help when it is necessary, so when Mr. Blair assailed the Counsel who was in his bad book, by saying hold your tongue and others, and when the remarks were dittoed, our Honourable Chief Justice shielded him, punishing the Counsel, although the quarrel was started by Mr. Blair and he was entirely to blame. So we can say

without the fear of contradiction, that our Honourable Chief Justice is not an independent man.'

II. 'There is another reason that induces us to think that he' (alluding to Mr. Justice Richards) 'has never studied our law properly for the reason that a lawyer does nothing that goes against him. Having asked a respectable Counsel to hold his tongue, which is a defamatory expression, one might be impressed with the idea that he has never received any legal education. By employing the expression he has shown that he is not at all a lawyer, and a Judge not qualified enough.'

III. 'We do not know whether the associates of our Honourable gentleman' (again alluding to Mr. Justice Richards) 'have made the London public houses their favourite resorts whence they have learned it, and our Honourable gentleman learned it from them to honour the High Court Counsel, and this is the only way in which he honours them.'

IV. 'If he once says:—My Lord, you please do the same (hold your tongue), then our Honourable Chief Justice, who might not be qualified enough for the due discharge of the routine of work, but he is the most competent in hurling his unerring javelin at the Counsel, will too readily do so, inflicting a deep wound which will not cure in the process of time, which will fester and bleed afresh and the wound only heals up when the aggrieved party courts death. So our readers can easily see that we have a wonderful Chief Justice who punishes an assailed and not an assailant with miraculous readiness and activity. He punishes not the wrong-doer, but the wronged, and thus he upholds justice. Can you furnish a parallel to this, our readers? We can confidently say not at all.'

"Up to the close of the case and even after the learned Government Advocate, whom we called upon on behalf of the Bar and as *amicus curiæ*, had commented on the scandalous tone in which these publications were couched, the Advocate concerned expressed no regret of any kind, but strenuously maintained that he was 'fully prepared to justify' and 'did justify all he had written.' After reading and weighing carefully each word contained in these passages we can only express our astonishment and regret that any person of light and learning can still maintain, as did

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the advocate concerned, that he had said nothing and written nothing in a contemptuous way. We are not dealing with an ignorant person, but with an advocate who, as he himself tells us, has received his education in the University of Edinburgh, was a student of the Society of Gray's Inn, and was called to the Bar therefrom.

"We have no alternative but to condemn every one of these passages as being scandalous writing, and the writer, as having, in writing and publishing them, been guilty of misconduct unworthy of an advocate of this Court.

"The advocate concerned sought to justify and defend what he had written by calling our attention to other issues of *The Cochrane*, and by arguing that because there was not a single Judge of whom he had not said something bad, and also something good, the two must be considered in the light of a set-off one against the other. We regret to have to say it, but we must say it, that this attempt at explanation merely aggravates the misconduct. As the learned Government Advocate pointed out to us at the hearing, and as we have afterwards been at the pains of verifying, these so-called expressions of praise are in every instance almost used as a foil to set off in a more conspicuous and aggravated manner scandalous matter that the advocate was bent on publishing. The files are on the record and speak for themselves.

"We need hardly add that we had much rather that our attention had not been called to these passages. But it was the advocate concerned who compelled us to look at them and to consider them. Our attention being called to them we can only adopt the words of Mr Justice Holroyd in *Rex* v. *Davison*, (1) that 'in the case of an insult to himself it is not on his own account that the Judge commits, for that is a consideration which should never enter his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs, not to suffer those things to pass, which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence, at least, it shall not be infringed.'

(1) (1821) 4 B. and Ald., 329.

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"Hitherto we have not said anything about the reckless want of truth that disfigures each one of the passages set out above from *The Cochrane* of the 1st of June, 1906.

"The advocate concerned has made no attempt to support the statements contained in those passages by evidence of any kind. It is true that he has filed an affidavit, but the only fact affirmed in that affidavit is that on the 19th April, 1906, the Hon'ble Mr. Justice Richards did use the expression 'Hold your tongue' when he (the advocate) was arguing a case before him.

"Regarding the first part of the passage No. I, an attempt was made to justify it on the ground that it was an opinion. As regards the second part we understand that the advocate found in a book, to which he obtained access by reason of its being in the library of the Court, a letter which was not addressed to him, but to another gentleman. That letter he admits having perused without authority from either the writer or the person addressed and, having perused it, he considers that he acted meritoriously in not forwarding it to the Secretary of State, but in returning it with a letter of his own to the Hon'ble the Chief Justice who was the writer. We have always understood that in any civilized country it is considered a dishonourable act to peruse a private letter not intended for the reader's perusal and addressed to another person. Such conduct is understood everywhere as conduct unworthy of any person who claims the status of a gentleman. But for the admission made by the advocate concerned, we should have found it difficult to believe that any one admitted to the Honourable Society of the Inns of Court could have considered it proper to do such an act, and still less, having done it, to attempt to justify his conduct. Moreover, the incident here mentioned is a good instance of the way in which acts in themselves proper have been distorted by the advocate concerned in order to bring the Court into contempt with the outside public. It has long been the established practice of this Court that where two or more Judges have heard a case and are agreed as to the general tenor of a judgment one Judge should prepare the judgment and submit it for the opinion and criticism of his fellow Judge or Judges. These criticisms are duly considered and, if accepted, the judgment issues as the judgment of the combined Court. It

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is an instance of this nature that the advocate concerned has distorted, and we fear we must say it, has wilfully distorted. The extracts II, III and IV, where they reflect upon the Hon'ble the Chief Justice or the Judge referred to are, the advocate concerned considers, sufficiently explained by the remark that they are opinions.

"Regarding the first and second contentions raised, it is hardly necessary for us to follow the advocate into the flimsy duality of persons which he attempts to set up. We are in this case concerned with Mr. Sarbadhicary, barrister-at-law, who has subscribed the article. It is in our opinion an article intended to scandalize the Court in the eyes of the public and the writer is responsible for it as an advocate of this Court.

Two days after the case had been argued and judgment reserved, the advocate tendered to the learned Chief Justice, who was taking applications, the following petition :—

'That in respect to the proceedings which have been taken by this Court against your petitioner under section 8 of the Letters Patent your petitioner has since himself considered the whole matter and taken the advice of some friends, and he begs now to express his unfeigned and deep regret at the publication of matter considered to be derogatory to the Hon'ble Judges and calculated to bring the administration of justice into contempt.

'2. That your petitioner regrets that he acted without deliberation and upon sudden impulse in writing the article which has given rise to proceedings against him.

'3. That your petitioner was under the honest impression that in writing the article, which on maturer consideration he does not now seek to justify, he was not acting as an advocate, but, irrespective of his belief or impression in the matter, he now withdraws all offensive and derogatory remarks about this Court and expresses his unqualified regret in so far as his conduct has appeared to the Judges of this Honourable Court as unbecoming an advocate and as otherwise than duly respectful to them, and trusts that the Honourable Court may be pleased to accept this apology.'

"Looking to the tone of this belated apology we feel ourselves unable to accept it. Moreover, we cannot lose sight of the fact

that this is not the first time this advocate has been found guilty of misconduct. He was suspended for three months for disrespect shown to a Judge in open Court and only readmitted to practice upon his tendering an apology to the Court.

"Notwithstanding this, he, in the article under consideration, refers to the incident in the following terms:—'The quarrel was started by Mr. Blair (the Judge to whom disrespect was shown) and he is entirely to blame.'

"To accept the apology now tendered would be, to use the words of Mr. Justice Wills, 'a stretch of charity which would degenerate into absurd and ridiculous weakness.'

"We are unanimous in arriving at the conclusion that Mr. S. B. Sarbadhicary has been guilty of gross misconduct in publishing an article containing the passages above set forth.

"The order of the Court is that Mr. S. Sarbadhicary be suspended from practice for a period of four years with effect from this date."

On this appeal, which was heard *ex parte*, the appellant appeared in person and contended that the High Court had no jurisdiction over him in the matter of the alleged misconduct as he was a member of the English Bar; that the Bench of the High Court by which his case was heard was not properly constituted because under rule 197 of the High Court the Bench ought to have consisted of five Judges and not three only; that the offence with which he was charged was committed by him not in his professional capacity, but in the capacity of editor of *The Cochrane* newspaper; that if the remarks published by him in his newspaper were objectionable or untrue he could have been proceeded against under the ordinary law, namely, section 500 of the Penal Code, Act XLV of 1860; and that his apology should have been accepted, and regarded as ample expiation of the offence. Reference was made to *In the matter of Rajendro Lal Mukerji* (1), *In the matter of Parbati Charan Chatterji* (2), Penal Code (Act XLV of 1860), sections 228, 500, *In the matter of Wallace* (3), *In re Weare* (4) *The Queen* v. *Castro* (5), *Ex parte Turner* (6) and *Lechmere Charlton's case* (7).

(1) (1899) I. L. R., 22 All., 49
(2) (1898) I. L. R., 17 All., 498.
(3) (1866) L. R., 1 P. C., 283
(4) (1893) L. R., 2 Q. B. D. 439
(5) (1871) L. R., 7 Q. B. 214
(6) (1841) 4 Mont., D. and D., 523.
(7) (1836) 2 Myine and Cr., 316.

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He also urged that the sentence of four years' suspension from practice was too severe.

1906, *December* 14*th*.—The judgment of their Lordships was delivered by Sir ANDREW SCOBLE:—

The petitioner in this case, Mr. Sashi Bhushan Sarbadhicary, is a barrister of Gray's Inn, and an advocate of the High Court of Judicature at Allahabad; and he complains of an order of that Court whereby he was suspended from practice in that Court for a period of four years, from the 5th July 1906, for "gross misconduct." The grounds of his appeal are nine in number, and as two of them relate to the competency of the Court to make the order, it will be convenient to dispose of them in the first instance.

The first objection is that the Court "had no jurisdiction to deal with the applicant for alleged misconduct, he being a member of the English Bar."

In the opinion of their Lordships this objection is untenable. By section 7 of the Letters Patent by which it was established, the High Court is authorized and empowered "to approve, admit, and enroll such and so many advocates . . . . as to the said High Court shall seem meet;" and by section 8 the High Court is empowered "to make rules for the qualification and admission of proper persons to be advocates . . . . and to remove or to suspend from practice on reasonable cause the said advocates." By rule 180 of the Court "any barrister of England or Ireland, and any member of the Faculty of Advocates in Scotland may present an application for his admission to the Roll of Advocates of the Court;" and on compliance with certain conditions specified in rule 181 may, under rule 182, if "the Chief Justice and Judges then present in Allahabad think fit, be admitted as an advocate of the Court." It is clear, therefore, that any barrister so admitted becomes thereupon subject to the disciplinary jurisdiction of the Court.

The second objection taken by Mr. Sarbadhicary is that the Court which dealt with the charge against him was not properly constituted under the Rules of the Court. Rule 2 provides that—

"A charge against an advocate . . . . in respect of any misconduct for which such person may be suspended or dismissed from practice . . . .

shall be heard and decided by a Bench of three Judges. Such Bench may, at the hearing, refer the matter for disposal to a Bench consisting of five Judges."

If this rule applies, there is no doubt that the Court which heard and disposed of Mr. Sarbadhicary's case was properly constituted, for it consisted of three Judges. But Mr. Sarbadhicary contends that, under Rule 197, which provides that "the Chief Justice and Judges present for the time being in Allahabad may, for good cause appearing to them, by an order in writing under the seal of the Court, suspend or remove from the Rolls of the Court any advocate . . . . ," he was entitled to have his case heard by a Bench of five Judges, as that number were then present in Allahabad. The learned Judges who heard the case, and before whom this objection was raised, say that "Rule 197 provides for cases in which the Chief Justice and Judges may for good cause, and without charge or trial, suspend or remove from the Roll of the Court any advocate of the Court." And their Lordships see no reason why they should reject this explanation. An advocate convicted of a criminal offence might properly be suspended or removed from practice under this rule without further charge or trial. In their Lordships' opinion, this objection also fails.

The facts of the case lie within a very short compass. On the 19th April, 1906, Mr. Sarbadhicary was conducting a criminal case before Mr. Justice Richards, when, to use the petitioner's language:—

"An altercation happened between the honourable gentleman and the Counsel about the administration of the oath to the accused by the Magistrate who tried them. The Counsel was backed by two depositions of the two accused . . . . They were showed to the Judge (who) wanted to assail the Counsel, but the latter, relying on his own innocence, stated that, as he had the copies, he was not the least to blame. The Judge was angry, and said, 'Why did the Counsel assail the Court below?' The Counsel stated that, before the files reached, the copies were the only source of his information; and sat. The Judge asked the Counsel to be polite, and the Counsel applied (to) the Judge for the same favour. The Judge remarked he should not be answered back. The Judge thereupon angrily said 'Sit down'"

In an affidavit filed in this matter, Mr. Sarbadhicary says the words used were "Hold your tongue." But whatever the words used, Mr. Sarbadhicary says he was "greatly affected" by them, and sent the Judge a notice that "he would be legally

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proceeded against, both civilly and criminally, on the expiration of two months." Before this period expired, on the 1st June 1906, Mr. Sarbadhicary published in a periodical called *The Cochrane*, of which he is both the editor and publisher, an article which has given rise to the order of suspension of which he now complains.

There is no doubt that the article in question was a libel, reflecting not only upon Mr. Justice Richards, but other Judges of the High Court in their judicial capacity and in reference to their conduct in the discharge of their public duties. There is also no doubt that the publication of this libel constituted a contempt of Court which might have been dealt with by the High Court in a summary manner, by fine or imprisonment, or both. The only question which their Lordships have to consider is whether the publication of such a libel constitutes "reasonable cause" for the suspension of an advocate from practice under the power conferred by the Letters Patent.

Their Lordships will not attempt to give a definition of "reasonable cause," or to lay down any rule for the interpretation of the Letters Patent in this respect. Every case must depend on its own circumstances. It is obvious that the intention of the Crown was to give a wide discretion to the High Court in India in regard to the exercise of this disciplinary authority. The Rules of the Court, to which reference has been made, indicate the precautions taken by the Court itself to secure that the powers shall not be used capriciously or oppressively, and there is no reason to apprehend that the just independence of the Bar runs any risk of being impaired by its exercise. On the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon Judges in their public capacity; and, having regard to the fact that in this case a contempt of Court was undoubtedly committed (and, as the evidence shows, not for the first time) by an advocate in a matter concerning himself personally in his professional character, their Lordships agree with the conclusion at which the Judges of the High Court arrived, and that there was "reasonable cause" for the order which they made.

Among other grounds of objection to the Order Mr. Sarbadhicary endeavoured to draw a distinction between "his capacity

as an advocate and his capacity as an editor," and cited the case of *In re Wallace* (1) as an authority in support of his argument. But that was an entirely different case from the present. In delivering judgment, Lord Westbury (at p. 294) says:—

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"It was an offence . . . committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor, and it had no connection whatever with his professional character, or anything done by him professionally, either as an advocate or an attorney."

Here the whole controversy arose from the misbehaviour of Mr. Sarbadhicary as an advocate conducting a case before the Court, and the contempt of which he was properly found guilty was committed in the attempt to vindicate his professional conduct in a publication for which he was solely responsible.

Their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise His Majesty to dismiss the appeal.

Appeal dismissed.

APPELLATE CIVIL.

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August 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

CHHAJJU GIR AND ANOTHER (DEFENDANTS) v DIWAN (PLAINTIFF).*

Hindu Law—Grihast Goshains—Succession—Custom—Adoption of Chela by widow of deceased Goshain.

The plaintiff set up a custom as prevalent amongst the grihast goshains of Hardwar and other places adjacent in the United Provinces whereby the widow of a deceased gosham was entitled with the concurrence of the elders of the sect to adopt a chela and successor to her deceased husband. *Held* on the evidence that such custom was not established. *Ramalakshmi Ammal* v. *Sivananthe Perumal Sethurayar* (2), *Khuggender Narain Chowdhry* v. *Sharupgir Oghorenath* (3), and *Govind Doss* v *Ramsahoy Jemadar* (4) referred to.

Semble that the sect of grihast goshains living mostly in these provinces at Hardwar, Dehra Dun and other adjacent places, are subject generally to the ordinary rules of Hindu law *Collector of Dacca* v. *Jagat Chunder Goswami* (5) referred to.

THE facts of this case are fully stated in the judgment of the Court.

* First Appeal No 6 of 1904 from a decree of Babu Madho Das, Subordinate Judge of Saharanpur, dated the 11th of December 1903

(1) (1866) L. R., 1. P. C., 283. (3) (1878) I. L. R., 4 Calc., 543.
(2) (1872) 14 Moo., I. A., 570. (4) (1843) 1 Fulton. 217.
(5) (1901) I. L. R., 28 Calc., 603.

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The Hon'ble Pandit *Sundar Lal* and Babu *Lalit Mohan Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the respondent.

STANLEY, C.J., and KNOX, J.—The litigation which has given rise to this appeal concerns the property which belonged to three brothers, namely, Dalpat Gir, Ganpat Gir and Dhanpat Gir, the sons of one Ram Gir. Dhanpat Gir died about the year 1895, leaving his brothers surviving him. Dalpat Gir died in the month of January 1902, leaving a widow, Musammat Beldevi. On the 26th of May 1902, Ganpat Gir died, leaving the defendant Musammat Ram Rakkhi, who is said to have been a mistress, and a son by her, namely, the defendant Chhajju Gir. The parties belong to the goshain community, and the plaintiff's case is that the property of a member of that community devolves upon his chela or disciple, and that according to custom the widow of a deceased goshain, in case her husband has no disciple at the time of his death, may nominate a disciple with the authority of the members of the community, and that the disciple so nominated succeeds to the property of her husband; that the plaintiff was nominated by Musammat Beldevi with the consent of the community and so became what, we may term, a posthumous pupil of Dalpat Gir, and as such entitled to his property. It is not stated in the plaint how the disputed property was acquired. It is merely alleged that it was first owned by Mahant Ram Gir and on his death devolved upon Dalpat Gir, Ganpat Gir, and Dhanpat Gir. It has been found by the Court below that the property is not endowed property and that Dalpat Gir, Ganpat Gir and Dhanpat Gir held their shares of it separately. These findings are not challenged. The defendant appellant in his grounds of appeal impeached the findings that the property was not endowed property, but this ground was abandoned before us.

The custom upon which the plaintiff relies is thus stated in the plaint. It is first alleged that Dalpat Gir at the time of his death authorized his widow to make a disciple in his name, and then it is alleged that "there has been a practice and custom in the goshain community that on the death of a person the members of the community cause a disciple to be made in the name of the

deceased and make him occupy his place. Accordingly, Musammat Beldevi, in accordance with the permission of Dalpat Gir and also the practice in the Goshain community, assembled the members of the community, made the plaintiff a disciple in the name of Dalpat Gir, deceased, at her house on the 6th of June 1902, and performed all the necessary rites." It is further alleged in the plaint that "it is also necessary for a newly made disciple, wishing to be the representative and successor of a deceased person, that he should be duly declared representative and successor by the members of the community after a feast has been given. Accordingly, after a feast had been given on the 12th October 1902, the members of the community declared the plaintiff a mahant to take the place and be the representative of Dalpat Gir, deceased, and therefore the plaintiff is the lawful owner of his (Dalpat Gir's) estate." We may here state that Dalpat Gir and Ganpat Gir succeeded to the share of the estate of Dhanpat Gir upon his death. There is no dispute as to this. The plaintiff claims to be entitled not merely to the share of Dalpat Gir but also to the share of Ganpat Gir, but we are at a loss to understand how he can establish any right to this share.

The defendant Chhajju Gir and his mother denied the existence of the custom. Chhajju Gir claims to be entitled to the property of Ganpat Gir as his disciple and he also claims to be entitled to it under the will of Ganpat Gir, dated the 20th of February 1902. But before us he did not so much rest his case on the merits of his own title as on the weakness of the plaintiff respondent's case.

The parties belong to the order of Sannyasis known as *Giris*. That order with others was, we are told by Mr. Ghose in his work on Hindu Law, founded by the great Hindu Philosopher Sankara in the eighth century A.D. Originally the members of this order were supposed to renounce the world and were strictly ascetics. The wealth of the ascetic consisted of his stick, begging bowl and the like and was invaluable to his disciples. As Gautama ordained "an ascetic shall have no hoard." In the course of time these bodies acquired wealth, and, so far from practising habits of stern austerity took to habits of luxury and worldliness. A section of them married and become Gribast (house-holders), while

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the remainder observed celibacy and are known as Nihangs. Ram Gir was a Grihast (or house-holder) and his sons likewise. They had not therefore absolutely renounced the world and were not ascetics in the strict sense of the word. This must be borne in mind in dealing with the questions which we have to determine.

The special rule as to the devolution of the property of an ascetic, laid down in the Yajnavalkya (ii, 137), Mitakshara (ii, 8), Daya Bhaga (xi, 6, sections 35 and 36), namely, "the heirs of a hermit, of an ascetic, and of a professed student, are in their order the preceptor, the virtuous pupil and spiritual brother and associate in holiness," cannot be strictly applied in this case. Mr. Mayne says that a case coming under these special rules seldom occurs, that "when a hermit has any property which is not of secular origin, he generally holds it as the head of some math or religious endowment, and succession to such property is regulated by the special custom of the foundation." He then observes:—"No one can come under the above heads for the purpose of introducing a new rule of inheritance, unless he has absolutely retired from all earthly interests, and in fact become dead to the world. In such a case all property then vested in him passes to his legal heirs, who succeed to it at once. If his retirement is of a less complete character, the mere fact that he has assumed a religious title, and has even entered into a monastery, will not divest him of his property, or prevent his secular heirs from succeeding to any secular property which may have remained in his possession." (See 6th edition, p. 778.) Mr. Ghose in the second edition of his valuable work, at page 781, says as to this question:—"The property mentioned in the Yajnavalkya, as the Mitakshara and the Apararka say, is the wealth of the hermit, invaluable to his disciples, *i.e.*, his stick, his begging bowl, and the like. Lands and money the Sannyasi cannot hold in his own right. But by the law of the land he is allowed to hold property in the same way as secular persons, and in such cases his secular heirs ought to take his property. In his comment upon a decision of a Bench of the Calcutta High Court in the case of the *Collector of Dacca* v. *Jagat Chunder Goswami* (1), holding that the preceptor of a deceased Bairagi was entitled to letters of administration of his

(1) (1901) I. L. R., 28 Calc., 608.

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estate, he observes, at page 788:—"With all respect to the learned Judges, it should be observed that according to Hindu law the ordinary rule of succession should apply to the case of that strange individual, the married ascetic. Indeed according to ancient law ascetics who have resumed worldly ways are slaves of the king and their property in strictness belongs to him."

It was contended in this suit on behalf of the appellant that a chela or disciple does not inherit the personal property of a Grihast (or house-holder) Goshain, and further, that the plaintiff respondent is not a disciple of Dalpat Gir. The learned Subordinate Judge held that though Ganpat Gir, Dalpat Gir and Dhanpat Gir held their shares separately and there was nothing to show that the property was endowed property, yet the sect of the Goshains to which they belonged is a semi-religious one and that "the same is the nature of their properties", that is, we take it, that the property in dispute though not endowed property is semi-religious property, whatever this means. He also held that the evidence adduced on behalf of the plaintiff established a custom among Goshains whereby a chela "is shaved in the name of a deceased mahant at the instance of his wife by the panches (elders), and if such chela performs the ceremony of bhandara and is installed on the gaddi of the deceased by the elders, he becomes the representative of the deceased with respect to his property." He further found that the plaintiff respondent was duly installed on the gaddi of Dalpat Gir by the elders of the sect in accordance with custom and performed the ceremony of bhandara, and is therefore the legal representative of Dalpat Gir. No distinction, it will be noticed, is here drawn between a Goshain who is a Nihang or who is possessed of a math, and a Goshain who is a householder and owns no endowed property.

There are two questions then for our determination. The first, whether or not the plaintiff respondent can be regarded as in any sense a chela or disciple of Dalpat Gir, and the second, whether or not a binding custom has been established whereby the personal property of a deceased Grihast or (house-holder) Goshain passes to his chela and not to his secular heirs.

First then let us see what a chela or disciple according to Hindu notions is. In the case of *Gobind Doss* v. *Ramsahoy*

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Jemadar, to be found reported in the Vyavastha Darpana by Shama Churn Sarkar, Vol. I, p. 299, and also in Fulton's Reports, Vol. I, p. 217, the plaintiff alleged that he was the chela or disciple and legal representative in estate, according to the laws and usages of Hindus, of one Makhan Das, deceased, a Hindu Bairagi (or religious devotee), and claimed to be entitled to sue as such for recovery of the property of the deceased. A defence was filed to the effect that a chela of a Hindu Bairagi does not, as such, succeed to the property of such a Bairagi in the event of intestacy. On behalf of the defendants it was contended that the three religious orders into which the twice born classes may enter are those of the Vanaprastha (hermit), the Sannyasi or Joti (the ascetic), and the Brahmachari (religious student), and reference was made to the passage of the Yajnavalkya which lays down that the wealth of a Vanaprastha is inherited by his Dharma bhratreka tirthana, or holy brother of the same hermitage, that of a Joti by satshishya (virtuous approved pupil), and that of a Brahmachari by his achariya (spiritual guide). It was contended that, assuming the Bairagi to be a sufficient description of the Joti of Yajnavalkya his goods are not inherited by his chela or pupil in that capacity, but by his satshishya (virtuous approved pupil). Then it was pointed out that a chela after he had served the Joti for a year may be made a satshishya if the Joti thinks him worthy of the honour; that there is a period of servitude for 12 months necessary before the aspirant pupil can become a satshishya or partake of its privileges, and that the pupil who has not become a satshishya can never inherit it. It was held that the plaintiff failed to show his right to sue. An extract from a letter which the editor of the reports had received from Baboo Prussonno Comar Tagore, stated to be a gentleman of well known learning and repute at the time, is appended to the report, from which it appears that no chela of a deceased ascetic can inherit his property unless he can prove himself to be a siso (that is, we understand, a satshishya). The extract is as follows:—"My conclusion therefore is that a chela or servant may, if qualified, be admitted as siso, but the mere denomination of chela does not necessarily imply the meaning of siso. The Hindu law recognises the right of inheritance of the latter

and consequently no chela of a deceased ascetic can inherit his property unless the former can prove himself his siso too. This is a nice distinction which I am led to draw between the two phrases and their respective applicability from the concurrent authority of the shasters and the usages and customs of the country." We further find appended to the report an extract from the work called Tuntur Shar by Kishna Nanda, which describes the respective qualities which should form the character of a spiritual guide and his religious pupil, and later on the following passage appears:—"A year's residence and association with each other is required to form the connection of the spiritual guide and the pupil. It is also enjoined in the Sar Sungroho that a good spiritual guide should put his dependent pupil to a year's probation. A knowledge of the mysterious and excellent Shasters should not be imparted to every one without distinction, it should be imparted to a well-behaved pupil after a year's residence with him." We refer to this case merely for the purpose of showing what are the qualifications of a chela. In the case of *Khuggender Narain Chowdhry* v. *Sharupgir Oghorenath* (1) the principle of succession upon which one member of an order of ascetics succeeds to another was laid down as being based entirely upon fellowship and personal association with the ascetic, and it was said that a stranger, though of the same order of ascetics, is excluded. It thus appears that a person who has had no association with a spiritual guide cannot, except by a fiction, be his chela. A posthumous chela is a contradiction in terms.

The authority upon which Mr. *Chaudhri* on behalf of the respondent has strongly relied for the proposition that a posthumous disciple may be appointed to a deceased ascetic is to be found in West and Buhler's Hindu law, Vol. I, p. 565. There in answer to the question whether a Goshain either of the sect Puri, Giri or Bharathi acquired a vatan like that of a Patil or Kulkarani, can it descend to his or his wife's disciple, the reply is:—"Among the Goshains of the abovementioned sects, a disciple is as good an heir as a son among other people. If a disciple was not nominated by the male Goshain, his wife may nominate one to succeed to her estate in the same manner as a widow among

(1) (1878) I. L. R., 4 Calc., 543.

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other classes is allowed to adopt a son. No objection seems to exist to such a proceeding." The learned Pandits give as the authority for this answer the Vyavahara Mayukha, para. 142, 1—4. A reference to this work will show that it does not bear out the alleged practice. The passage referred to contains the extract from Yajnavalkya already quoted, stating the rule prevailing as regards the estates of ascetics, namely, "the heirs of a hermit, of an ascetic, and of a student, are in their order the preceptor, the virtuous pupil and the spiritual brother and associate in holiness." Moreover, the answer would seem to presuppose that the deceased Goshain for whom his wife may nominate a chela to succeed him had disciples, and that it was one of these disciples whom she might nominate as his successor. It does not, at least not clearly, support the suggestion that if a Goshain had no disciple during his life-time his wife could elect one after his death.

Let us see now on what evidence the novel custom which has been set up in this case is sought to be supported. Mahant Jhandu Nath, who is a Sannyasi, purported to give an account of the nomination and election of the plaintiff as a mahant after the death of Dalpat Gir, though he did not attend the meeting at which he was elected. He was asked whether any woman had ever made a disciple in the way in which the plaintiff, Diwan Gir, was made a disciple of Dalpat Gir, and his answer was in the first instance in the negative, and then he stated that Ram Saran Gir's wife made Ram Ratan Gir a disciple after the death of her husband, or that she caused the members of her brotherhood to make him a disciple. In answer to the further question whether Ram Gir was the holder of a math, his reply was that he could not be called the holder of a math, inasmuch as mahants who are grihasts are not holders of a math. He also stated that at the time of his death Ram Gir was not a nihang mahant, and that when a mahant is not nihang his sons become his heirs; and he followed this up by saying that when a mahant is not a nihang, that is, is a house-holder or grihast, his wife becomes his heir on his death. The evidence of this witness does not to any appreciable extent support the alleged custom. In answer to a question by the Court he stated that "if a grihast mahant should not give

permission to his wife as to the making of a disciple, his wife can on his death make a disciple in his name even without such permission. After the death of a house-holder mahant his widow has the same power with regard to the making of a disciple as he himself. As regards the power of making a disciple, there is no difference between a mahant and his widow." What authority the witness had for this statement, we are not informed. He is a comparatively young man, being only 34 years of age, and is not shown to have any special knowledge of the rules of the Goshain community.

Another witness, Gajraj Bharti, also a Gosain, deposed that Diwan Gir was made a disciple of Dalpat Gir four or five months after the death of Dalpat Gir. The panch, he said, were called by Musammat Beldevi to her house, when she told them that she wished to have Diwan Gir made a disciple in the name of her husband and that the Panch agreed to carry out her wish, and thereupon the necessary ceremony of installation was performed. He mentioned four or five cases in which in recent years disciples of deceased Goshains had been nominated by their wives. A panchayatnama was drawn up and signed by this and other witnesses testifying to the election and installation of Diwan Gir as the disciple of mahant Dalpat Gir. We shall refer to this document more particularly later on. It was produced by this witness. Cross-examined as to it the witness used these significant words:—"People said females have caused disciples to be made, but it is invalid. They tried to find out a precedent. I also did the same." It appears, therefore, that the partisans of the plaintiff found it necessary to search for a precedent for such an appointment as theirs as that of the plaintiff. This witness is the brother of Kalu Bharti whose wife and Musammat Beldevi are sisters. Of the instances which he gave of the making of disciples by the widow of a deceased Goshain, two were disciples of Kashi Nath who were made disciples by his wife. We may point out that the election of the plaintiff Diwan as a disciple of Dalpat Gir led to disturbances which resulted in the bringing of criminal proceedings by Chhajju Gir against this witness and others.

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The next witness to whom we would refer is Ghanshiam Puri, also a Goshain, resident at Hardwar. In answer to the question:—"Should any one die leaving a widow among your community what will be her right as to the making of a disciple." (It will be noted that the question was not directed to the case of a grihast Goshain, but to the Goshain community generally); his reply was:—"A disciple is made. He is made in this way. The members of the brotherhood are invited. When they come to the place they ask the woman:—'Why have you invited us?' The woman says:—'Make a disciple in the name of my husband. The members order a man, a mahant:—'You should make a disciple, cut the tuft of his hair.' Disciples made in this way are to be found in my community." Then he mentioned the names of five persons who were made disciples in this way, and stated that they had got the properties of their spiritual guides. He further stated that the sons of a Goshain have no right to his property without their having been made disciples, and that if a Goshain left a wife and a son who had not been made a disciple, his property devolved upon the wife and not upon the son. He was asked his means of knowledge of this rule and stated that he heard it from his father and spiritual guide. It was further elicited from this witness that there are about 17 or 18 families of Goshains at Hardwar and that all of them are grihasts. He further deposed that a wife can make a disciple without obtaining permission from her husband to do so, and that children of a kept woman have the same right as those of a wedded wife.

Puran Gir and Sheoraj Gir gave evidence to the same effect. Sheoraj Gir admitted that his knowledge on the subject was derived from his having seen the initiation as disciples of Ratan Gir, Khushal Bharti and Bhajjan Gir, and also from hearing of it from the Goshains. He is a man of 34 years of age and is one of the parties against whom the complaint was lodged in the criminal Court by Chhajju Gir in connection with the initiation of the plaintiff Diwan Gir.

Ganesh Gir, another witness, also testified to the alleged custom and to the initiation of the plaintiff Diwan Gir. He stated that Bishnu of his village Rahmatpur had two disciples initiated on the death of her husband. He deposed, however, that

these disciples had left the village and that the property which belonged to the deceased Goshain had been sold by auction.

Hoshiar Gir, a resident of Daulatpur and a Goshain, deposed that he was initiated as a disciple of Harnand Gir by Harnand Gir's wife seven or eight years previously in the village of Daulatpur. In cross-examination it was elicited that Harnand Gir had no son and that the witness and Ganpat Gir were his nephews and that both the witness and Ganpat Gir inherited the property of Harnand Gir. Further he deposed that there was a will in his favour. It was not therefore out of the usual course that he and his brothers should inherit the property of Harnand Gir.

Several other witnesses were examined, but their evidence does not put the case further. It simply shows that there have been in the last 20 years several instances in which the widows of deceased Goshains nominated disciples, and that the disciples so nominated were recognised as the disciples of their deceased husbands. What the property was which they inherited or how it was acquired, or whether it was endowed property or not the evidence does not show.

It is a significant fact that on the initiation of the plaintiff, which, as we have said, was followed by disturbances leading to criminal proceedings, a panchayatnama was executed to testify to the election of the plaintiff as a disciple of Dalpat Gir. This document we find was signed by all the witnesses without exception who have supported the plaintiff's case as regards the alleged custom. It is dated the 12th of October 1902, and recites the death of Dalpat Gir on the 16th of January 1902, without leaving any disciple, and the alleged practice among the Goshain community of Hardwar and the neighbourhood, that on the death of a mahant some person approved of by the community and the widow of the deceased should be nominated as a disciple. Then follows a declaration that on the 6th of June 1902, the members of the Goshain community assembled at the house of mahant Dalpat Gir with the consent of his widow Musammat Beldevi, made the plaintiff Diwan Gir, who is stated to be a relation of Dalpat Gir, and whom Dalpat Gir intended to make his disciple in his life-time, a disciple in the name of mahant Dalpat Gir. The document certifies that the real and actual disciple of Dalpat

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Gir is Diwan Gir, nominated and appointed lawfully according to law and the custom of the Goshain community, all the ceremonies essential and requisite for this appointment having been fully observed.

Now if the alleged custom was a recognised custom, it is not apparent what the necessity was for the preparation and signing of this document. Indeed it rather suggests that the parties to it had misgivings as to the propriety of their action in interfering with the devolution of the property of Dalpat Gir. The search for precedents is also suggestive. The object of making the plaintiff a disciple of Dalpat Gir manifestly was for the purpose of securing for him the property of Dalpat Gir.

Not a single document has been given in evidence in support of the alleged custom, and the cases in which chelas have been appointed by the widows of deceased house-holder Goshains are of recent date. It would seem that the small community of grihast Goshains at Hardwar are bent upon introducing a new usage as to the devolution of the property of the members of their community. What the necessity is for a grihast Goshain to have a chela is not apparent. Such a Goshain has not cast off the world and become an ascetic. On the contrary he is immersed in worldly affairs and has his family to look after. His time is not occupied in the study of the shastras or in imparting a knowledge of the shastras to pupils. It does not seem reasonable that the sons of such a Goshain under such circumstances should be excluded from inheriting his property by any chela who may be appointed by his widow.

As we pointed out, the defendants appellants did not rest their case in the Court below or before us so much upon the strength of their own title as upon the weakness of the plaintiff's case. This they were entitled to do. They did, however, adduce some evidence to prove that amongst grihast Goshains no one is placed upon the gaddi, as in the case of nihangs. An important matter is that Ram Gir made a will (No. 221C of the record), dated the 29th of November 1879, which is witnessed by a number of members of his community, and it left his property to his three sons in equal shares and no question was raised as to his power to do so. Moreover we find that his three sons partitioned his property

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between them. This partition was carried out by a deed dated the 6th June 1892. and, as has already been pointed out, the three sons thereafter held their shares separately. In that deed it is recited that the property was owned and possessed by the executants as ancestral joint property, left by mahant Ram Gir, their deceased guru and father. A provision in that deed to the effect that the executants should not have power to transfer their shares to a stranger was relied on by the learned advocate for the plaintiff respondent, as showing that the property was not regarded as being subject to the ordinary rules governing secular property; but we do not see that this helps his case to any appreciable extent. Ganpat Gir disposed of his share by a will, dated the 20th of February 1902, in favour of a place of worship inside his house called Mahadeo Jeo and also in favour of the defendants appellants, Chhajju Gir and Musammat Ram Rakki.

Upon the whole we are unable to say that the custom set up by the plaintiff respondent was proved by such clear and unambiguous evidence as is requisite for the establishment of a custom or usage modifying the ordinary law of succession. A custom whereby the sons of the owner of the property may be deprived of their right to that property by the appointment, after the death of their father, of a chela to him by his widow or by the community to which they belong is a startling one. This is the custom which the plaintiff respondent sets up. We should require the clearest evidence of the antiquity of such a custom before we could give legal recognition to it. No evidence in proof of the antiquity of the custom has been given. We merely have a few instances of its adoption extending over a period of about 20 years. We may quote with advantage the language of their Lordships of the Privy Council in the case of *Ram Lakshmi Ammal* v. *Sivanantha Perumal Sethurazar* (1) in regard to special usages. At page 585 they say:—"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be

(1) (1872) 14 Moo., I. A., 571.

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established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence and that they posse s the conditions of antiquity and certainty on which alone their legal title to recognition depends." The evidence before us in this case in proof of the alleged custom is neither clear or unambiguous, and it by no means satisfies us that the alleged custom possesses the conditions of antiquity or certainty entitling it to recognition. The plaintiff respondent therefore has failed to establish the custom which he set up and his suit must fail.

We therefore allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in this Court and in the lower Court.

Appeal decreed.

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August 8

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

KHUDDO AND OTHERS (DEFENDANTS) v. DURGA PRASAD AND ANOTHER (PLAINTIFFS). *

Act No XV of 1856 (Hindu Widows' Re-marriage Act), section 2—Hindu widow—Re-marriage permitted by rules of caste—Widow not deprived of property of her first husband.

Where the rules of her caste recognize the right of a Hindu widow to re-marry, a re-marriage has not the result of divesting her of the property of her first husband.

Har Saran Das v. *Nandi* (1), *Dharam Das* v. *Nand Lal* (2) and *Ranjit* v. *Radha Rani* (3) referred to.

G died, leaving a widow *T* and a mother *K*. *T*, being permitted to do so by the custom of the caste, married again. *T* transferred her interest in her first husband's property to *D* and *S*. *K* purported to sell the same property to *L*, who mortgaged it to *K P* and *N E*. *Held*, on suit by *D* and *S* for recovery of the property transferred, that the plaintiffs were not bound to reimburse the defendants (*K*, *L* and *L*'s mortgagees) in respect of any debts of *G* which they might have paid.

THE facts of this case are as follows:—

One Ghuran Kasodhan died possessed of certain immovable property leaving him surviving his widow Musammat Thakur Dei

* Second Appeal No. 907 of 1905, from a decree of W. Tudball, Esq., District Judge of Gorakhpur, dated the 24th of July 1905, modifying a decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 3rd of May 1905.

(1) (1889) I. L. R., 11 All., 330. (2) Weekly Notes, 1880, p. 78.
(3) (1898) I. L. R., 20 All., 478.

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and his mother Musammat Khuddo. The caste being one the rules of which permitted widows to re-marry, Thakur Dei married one Tika Kasodhan. After her re-marriage Thakur Dei transferred her late husband's property by gift to Durga Prasad and Sita Ram on condition that they paid off Ghurau's debts. On the same day Khuddo, the mother of Ghurau, transferred the same property to Lachhman, the son of Durga Prasad, similarly stipulating for the payment by the transferee of Ghurau's debts.

Lachhman, in order to pay off the said debts, mortgaged the property to Kishan Prasad and Nageshar. The transferees from Thakur Dei, Durga Prasad and Sita Ram, then brought a suit to recover possession of the property of Ghurau. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the plaintiffs' claim and also directed that the plaintiffs should pay to the defendant Lachhman such amount as had been paid by the defendants on account of the ancestral debt. The defendants appealed and the plaintiffs filed objections under section 561 of the Code of Civil Procedure to such part of the decree as directed payment of the debts of Ghurau. The lower appellate Court (District Judge of Gorakhpur) dismissed the appeal and allowed the plaintiffs' objections, making the decree a simple decree for possession.

Babu *Jogindro Nath Chaudhri*, Babu *Durga Charan Banerji* and Munshi *Gulzari Lal*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the respondents.

STANLEY, C.J., and RUSTOMJEE, J.—The facts of this case are as follows:—On the death of his father Gajadhar, his son, Ghurau, succeeded to the property which is the subject matter of this litigation. He died in the month of February 1904, leaving a widow, Musammat Thakur Dei, and a mother, Musammat Khuddo. The parties belong to the Kasodhan caste, and according to the custom of this caste a widow is entitled to re-marry. Musammat Thakur Dei did re-marry. She, on the 3rd of September 1904, transferred the interest which she derived from her husband in the property by gift to the plaintiffs. On the same day Musammat Khuddo sold the same property to Lachhman Prasad, defendant, second party, and he in his turn mortgaged the property in favour of the defendants 3 and 4. The main

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contention in the Court below and before us was that Musammat Thakur Dei, by reason of her re-marriage, forfeited her interest in her husband's property under the provisions of section 2 of Act XV of 1856. Another point has been raised before us in this appeal, to which we shall presently refer. This question has come before this Court on several occasions. In the case of *Har Saran Das* v. *Nandi* (1) it was decided by Straight and Brodhurst, JJ., that a widow belonging to the sweeper caste, in which there is and in 1856 there was, no obstacle by law or custom against the re-marriage of widows, did not by marrying again forfeit her interest in the property left by her first husband. This decision was followed in the case of *Dharam Das* v. *Nand Lal* (2) and again in the case of *Ranjit* v. *Radha Rani* (3). In the last-mentioned case, Blair and Aikman, JJ., stated in their judgment that in addition to the cases to which we have referred there were several unreported cases in which the decisions followed the decision in *Harsaran Das* v. *Nandi*. The learned Judges say:—"We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent *cursus curiæ* in this Court." It has been pointed out to us that the decisions of the Bombay and Calcutta High Courts conflict with the decisions of this Court, but in view of the fact that the question has been determined by at least four Judges of this Court, we do not think that we should express any doubt upon the correctness of those decisions by sending, as we are asked to do, this case for determination to a larger Bench. The case is governed by those decisions and we must so hold.

The remaining question arises upon the fourth ground of appeal. It is there alleged that the appellants admittedly paid mortgage debts due by Musammat Thakur Dei's husband at a time when they were interested in their payment and which the respondents were bound to pay and that therefore the appellants were entitled to be reimbursed the amount so paid.

We think that the learned District Judge deals in a reasonable way with this question. He says:—"Lachman did not act on behalf of the plaintiffs, but as of his own right and denying

(1) (1889) I. L. R., 11 All., 330. (2) Weekly Notes, 1899, p. 78.
(3) (1898) I. L. R., 20 All., 475.

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the plaintiffs' title. If he had paid any of the deceased's creditors, he must recover from them and refund to the mortgagees what he borrowed from them. Neither he nor they (mortgagees) have any right to keep the plaintiffs out of possession or to burden the estate with a mortgage against the will of the latter. The plaintiffs, no doubt, will have to pay off the debt due from the deceased, but they may prefer to do so by some other arrangement and I see no justice in forcing them to abide by the result of an arrangement made by an enemy."

We do not think that this is a case in which we ought to impose any conditions upon the plaintiffs. Their suit is a suit to recover possession of property to which they have established their title. If the defendants have any just claim as against them in respect of debts which have been paid off, which they can legally enforce, it is open to them to institute a suit for that purpose. We therefore dismiss the appeal with costs.

Appeal dismissed.

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August 10.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Rustomjee.

LIAKAT HUSAIN (PLAINTIFF) *v* RASHID-UD-DIN AND OTHERS (DEFENDANTS).*

Pre-emption—Sale of property to a stranger—Re-sale to a co-sharer before a suit for pre-emption is brought.

Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger, but, before a suit for pre-emption is brought, passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained, and this rule is not affected by the fact that the co-sharer in whom the property sold to a stranger revests was a party to its sale to a stranger. *Bhagwan Das v. Mohan Lal* (1) referred to.

THIS was a suit for pre-emption arising out of the following circumstances. During the years 1903 and 1904 the members of the family of Shaikh Nasir-ud-din, who were owners of a 6 pie share in patti Nanku Singh of mauza Gauhari, sold their interest in the said patti by seven separate sale-deeds to sue Abdul Hamid. Out of the vendors two persons, Rashid-ud-din and Mukhtar Ahmad, owned shares in the patti which were not conveyed to Abdul Hamid, and they continued to hold these

* Second Appeal No. 771 of 1905 from a decree of W. J. D. Burkitt, Esq., District Judge of Allahabad, dated the 1st of August 1905, reversing a decree of Pandit Raj Nath Sahib, Subordinate Judge of Allahabad, dated the 23rd of December 1904.

(1) (1903) I. L. R., 25 All., 421.

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shares. They were parties to two only out of the seven sale-deeds referred to above. One Liakat Husain, who was a co-sharer in the village of Gauhari, the vendee Abdul Hamid being a stranger, claimed pre-emption of the 6 pie share in patti Nanku Singh; but apparently was long in coming to terms with the vendee, who on the 16th of September 1904 resold the property to Rashid-ud-din and Mukhtar Ahmad. Liakat Husain then instituted a suit for pre-emption. The Court of first instance (Subordinate Judge of Allahabad) decreed the plaintiff's claim, holding that Rashid-ud-din and Mukhtar Ahmad were not entitled to set up their rights as co-sharers against the plaintiff because they had themselves been parties to two of the sales which gave rise to the suit for pre-emption. On appeal, however, by Rashid-ud-din and Mukhtar Ahmad this decree was reversed by the District Judge, who dismissed the suit. The plaintiff thereupon appealed to the High Court.

Mr. *Karamat Husain* and the Hon'ble Pandit *Sundar Lal*, for the appellant.

Dr. *Tej Bahadur Sapru* and Pandit *Mohan Lal Nehru*, for the respondents.

STANLEY, C.J., and RUSTOMJEE, J.—The members of the family of Sheikh Nazir-ud-din were the co-sharers in a six pie share in patti Nanku Singh, mauza Gauhari. In the years 1903 and 1904 they sold their shares to the defendant, Abdul Hamid, in seven different sale transactions. These sales were carried out by seven sale-deeds. To two of these sale-deeds alone were the defendants respondents, Rashid-ud-din and Mukhtar Ahmad, parties. These co-plaintiffs owned shares in the patti which were not conveyed by them to Abdul Hamid, and they continued to hold these shares. The suit out of which this appeal has arisen was instituted on the 24th of September 1904, by the plaintiff appellant, Liakat Husain, who is also a co-sharer in the village, to pre-empt the sales so carried out in favour of Abdul Hamid who was a stranger to the coparcenary body. Before, however, the suit was instituted, namely, on the 16th of September 1904, Abdul Hamid sold and conveyed all the property which he had so purchased to the defendants respondents. The plaintiff alleged in his plaint that this sale to the defendants

respondents, Rashid-ud-din and Mukhtar Ahmad, was fictitious, collusive and without consideration, and was made in order to defeat plaintiff's right of pre-emption.

The Court of first instance decreed the plaintiff's claim, but upon appeal the learned District Judge reversed the decision of the Court below and dismissed the plaintiff's suit. The lower appellate Court agreeing with the Court below found that the evidence failed to show that the sale carried out in favour of the defendants respondents was not genuine.

The only question for determination by us is whether the defendants respondents by joining in the sale of the shares comprised in two of the sale deeds to which they were parties thereby precluded themselves from purchasing the property from Abdul Hamid. The argument advanced on behalf of the plaintiff appellant is that Rashid-ud-din and Mukhtar Ahmad having concurred in a sale in favour of Abdul Hamid, a stranger, forfeited their right to pre-empt that sale and in fact could not enter into competition with the plaintiff in the matter of pre-emption. As regards the shares comprised in the five sale-deeds to which Rashid-ud-din and Mukhtar Ahmad were no parties, it is clear that they did not forfeit their right of pre-emption: they stand on the same footing, as regards pre-emption, as the plaintiff. This is admitted by the learned advocate for the plaintiff.

As regards, however, the shares comprised in the sale-deeds to which they were parties, Mr. *Sundar Lal* presses the argument that the defendants respondents having joined in the sale of these shares to a stranger must be treated themselves as strangers to the coparcenary body and cannot compete with the plaintiff in the matter of pre-emption. We think that there is no force in this argument. Rashid-ud-din and Mukhtar Ahmad are not claiming pre-emption. What happened was that before the institution of the plaintiff's suit, they, being co-sharers in the village, purchased from Abdul Hamid all the property which had been conveyed to him. The property found its way back into the hands of co-sharers before the institution of pre-emption proceedings. The object of pre-emption is to keep strangers out of the coparcenary body of a village and so maintain the unity of the coparcenary body. If before pre-emption proceedings

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are instituted, the property has found its way into the hands of co-sharers, there is no reason for allowing pre-emption, which is by the way a very weak right. The principle governing a case of the kind is thus stated in the judgment in *Bhagwan Das* v. *Mohan Lal* (1) to which one of us was a party, namely:—"Where a share has in violation of the provisions of the wajib-ul-arz been sold to a stranger, if before the institution of a suit for pre-emption that share has found its way into the hands of a co-sharer whose rights of pre-emption as such are equal to those of the plaintiffs in a suit for pre-emption subsequently instituted then the pre-emptor's suit will fail. The reason of the rule seems to be that as the object and cause of the institution of pre-emptive rights is the desire to keep strangers excluded from the coparcenary body, the reason and object cannot justify a pre-emptive suit by one co-sharer against another to compel the latter to surrender a share over which his pre-emptive rights are on the same level as those of the plaintiffs." We are unable to hold that the fact that the defendants respondents Rashid-ud-din and Mukhtar Ahmad could not have enforced a right of pre-emption as against Abdul Hamid so far as regards the shares comprised in the two sale-deeds to which they were parties, precludes them from setting up the revesting of those shares in themselves by a genuine sale before the date of the suit as a complete answer to the plaintiff's claim. We think that the decision at which the learned District Judge arrived is correct and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1903) I. L. R., 25 All., 421.

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August 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

BANMALI PANDE (PLAINTIFF) v. BISHESHAR SINGH AND ANOTHER (DEFENDANTS) *

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 20, 21 and 31—Occupancy holding—Rights of alienation possessed by occupancy tenants—Mortgage.

Held that the law enacted in sections 20 and 21 of the Agra Tenancy Act, 1901, obliterates any distinction which might have existed or have been supposed to exist between the right of occupancy and the right to occupy wherever transfers were made or contemplated by tenants, and that the tenants mentioned in these sections can no longer transfer either the right of occupancy or the right to occupy otherwise than by a sub-lease.

A subsequent mortgagee of an occupancy holding, whose mortgage was executed after the coming into force of the Agra Tenancy Act, has, therefore no right to redeem a prior mortgage over the same holding. *Khiali Ram* v. *Nathu Lal* (1) and *Brij Mohan Das* v. *Algu* (2) distinguished. *Madan Lal* v *Muhammad Ali Nasir Khan* (3) approved.

THE plaintiff in this suit claimed as subsequent mortgagee of a cultivatory holding of one Dip Singh a right to redeem a prior usufructuary mortgage over the same holding granted by Dip Singh to Bisheshar Singh and Kauleshar Singh, who were in possession. The Court of first instance (Munsif of Rasra) decreed the plaintiff's claim. The defendants, first mortgagees, appealed, and in appeal raised the plea that under the provisions of the Agra Tenancy Act, 1901, the mortgage in favour of the plaintiff was invalid and the plaintiff therefore had no right to sue for redemption of their mortgage. The lower appellate Court (Subordinate Judge of Ghazipur) accepted this contention, and, reversing the decision of the Munsif, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Maulvi *Abdul Majid*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

STANLEY, C.J., and KNOX, J.—The subject matter of the suit out of which this second appeal arises is the interest of an occupancy tenant, and the question which we have to decide is

* Second Appeal No. 1288 of 1904, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 15th of September 1904, reversing the decree of Babu Man Mohan Sanyal, Munsif of Rasra, dated the 12th of May 1904.

(1) (1893) I. L. R., 15 All., 219. (2) (1903) I. L. R., 26 All., 7.
(3) (1906) I. L. R., 28 All., 696.

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whether the holder of a subsequent usufructuary mortgage which purports to have been created over the interest of an occupancy tenant can sue for redemption of a prior usufructuary mortgagee who claims to hold a similar mortgage over the same holding. The Court of first instance decreed the claim in favour of the subsequent mortgage. The lower appellate Court held that the mortgage under which the plaintiff claimed was invalid and unlawful, that the plaintiff had acquired no rights in respect of the "mortgage land sought to be redeemed" and was in no way entitled to claim "redemption" under the Transfer of Property Act. It accordingly dismissed his suit. Three pleas are taken in appeal—the first is that the "mortgage" is not absolutely void, but is voidable as against the landlord; the second is that as neither the landlord nor the tenant had questioned the validity of the "mortgage" the defendants had no right in law to question the right of the plaintiff to maintain the suit, and the third was that the lower appellate Court had not taken into consideration the provisions of section 31 of the North-Western Provinces Tenancy Act, 1901. It will be seen that this third plea is virtually the first plea over again in different terms. The learned counsel for the appellant felt, as he proceeded in his argument, the difficulty of treating his client's rights as the rights of a mortgagee, and he adopted the line of reasoning sanctioned in the Full Bench ruling of this Court, *Khiali Ram* v. *Nathu Lal* (1). In that case it was held that "although a tenant with a right of occupancy, other than a tenant at a fixed rate, cannot legally transfer his right of occupancy, he can sublet the right to cultivate the land comprised in his occupancy holding, as such a sub-letting does not profess to be a transfer of the right of occupancy, and is not in contravention of section 9 of Act No. XII of 1881." Again in the same judgment it is laid down by the learned Judges, at page 230, that "the right of a zamindar under Act No. XII of 1881 to obtain an enhancement of the rent payable to him or to obtain an ejectment of his occupancy tenant and of those holding under him, cannot be interfered with or lessened by the fact that his occupancy tenant has by a lease, or other form of sub-letting, or by a

(1) (1893) I. L. R., 15 All., 219.

usufructuary mortgage, to the granting of which the zamindar was not an actively consenting party, sub-let or mortgaged the occupancy holding or any part of it." The learned counsel points out that this view was endorsed by the learned Judges of this Court who decided the case of *Brij Mohan Das* v. *Algu* (1). In this case the objection taken to the decision of the Full Bench of this Court, namely, that the only question referred to the Full Bench was whether or not an exproprietary tenant could sub-let his holding or a part of it, and so far as it applied to the interest of an occupancy tenant that judgment is an *obiter dictum* was fully considered. It was held after much consideration that the second paragraph of section 9 of the North-Western Provinces Rent Act, 1881, was no bar to the creation of a usufructuary mortgage of an occupancy holding by a tenant having a right of occupancy.

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The learned counsel also urged that the Tenancy Act was an Act intended only to regulate the relations subsisting between landlords and tenants. The provisions contained in section 20 were provisions created and intended to protect and guard the interests of the landlord, and in construing them the Court should take into consideration the provisions of section 21 of the same Act. Section 81 enacts that every sub-lease or other transfer, etc., made by a tenant in contravention of the provisions of this Act shall be voidable as hereinafter provided. Further that when a tenant has made such a sub-lease or other transfer the landholder may sue for the cancellation of the same or for ejectment of the tenant or other transferee or of both. If these two sections were read together, he contended that the provisions of the Tenancy Act, 1901, did not affect and were not intended to affect transfers between tenants and transferees from tenants, and that such transfers, even in the case where the landlord was concerned, being voidable and not void, such transactions admitted of being validated.

We are ready to admit freely that we find very great difficulty in reconciling and in interpreting the language used in the Tenancy Act, 1901, as for instance in section 21, where it is laid down that where the interest of a tenant is not transferable,

(1) (1903) I. L. R., 26 All., 78.

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he shall not be competent to transfer his holding or any portion thereof otherwise than by lease as hereinafter provided.

In considering, however, the argument addressed to us by the learned counsel it is important to remember that the Tenancy Act of 1901 is not, as Act No. XII of 1881 was, an Act to amend the law relating to the recovery of rent, but an Act to consolidate and amend the law relating to agricultural tenancies, and that the language used in section 9 of the Act of 1881 has been very much amplified in sections 20 and 21 of the Act of 1901. While section 9 of Act No. XII of 1881 dealt with the rights of tenants at fixed rates and other rights of occupancy, section 20 of the present Act deals with the interest of expropriatary tenants, occupancy tenants, etc. It declares that those interests are not transferable in execution of a decree of a Civil or Revenue Court, and also that an expropriatary tenant and an occupancy tenant are not competent to transfer their holdings or any portion thereof otherwise than by a sub-lease as provided in the Act. Now the word "interest" which is used in the Act of 1901 is a word of a very large and comprehensive nature. While section 9 of Act No. XII of 1881 merely enacted that "no other right of occupancy shall be transferable in execution of a decree or otherwise," the Act of 1901 uses the wider term "interest" and provides that the interest of an occupancy tenant is not transferable in execution of a decree or otherwise, etc. The right to cultivate the land is one interest, the right to pay rent for such holding at favourable rates is another interest which an occupancy tenant has in the land he holds. Both interests are now declared not transferable. It appears to us then that the law enacted in sections 20 and 21 obliterates any distinction that might have existed or have been supposed to exist between the right of occupancy and right to occupy wherever transfers were made or contemplated by tenants, and that the tenants mentioned in these sections can no longer transfer either the right of occupancy or the right to occupy otherwise than by a sub-lease.

The Transfer of Property Act has drawn a sharp line of distinction between mortgages and leases, and from the reference made in that Act to leases for agricultural purposes contained in

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section 117 it may well be inferred that leases for agricultural purposes stand on a different footing from mortgages. This is also apparent from reading section 10, cl. 2, and section 31 of Act No. II of 1901 together. The case before us is of a mortgage such as is contemplated and understood by "mortgages" in Act No. IV of 1882. Were we to grant a decree in this case, the decree would be intended to operate in the direction of transferring the interest of the occupancy tenant mortgagor from the prior mortgagee and into the hands of the plaintiff appellant. This would be in direct conflict with the provisions of section 20, which, as already pointed out, enacts that the interest of an occupancy tenant is not transferable in execution of a decree of a Civil or Revenue Court, and it is not for us to grant a decree which could not afterwards be executed, but would remain infructuous. Our attention has been drawn to the case of *Madan Lal* v. *Muhammad Ali Nasir Khan* (1) in which the same view was held by our brother Richards. For these reasons we hold that the view taken by the lower appellate Court was the right view, and we dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Rustomjee

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August 15

BHADDAR (DEFENDANT) *v.* KHAIR-UD-DIN HUSAIN (PLAINTIFF) AND BIJOLA (DEFENDANT) *

Land-holder and tenant—Site in abadi occupied by non-agricultural tenant—Adverse possession—Licence—Act No. V of 1882 (Indian Easements Act), section 60.

A person who was neither an agricultural tenant nor a village handicraftsman was found in possession of a house in the abadi which he and his predecessors in title had held for a period of considerably more than twelve years, without paying rent or acknowledging in any way the title of the zamindar to the site upon which it was built. *Held* that such person had acquired the absolute ownership of the site.

IN execution of a decree against one Parai the decree-holder Bhaddar caused to be attached and advertised for sale certain houses, situated in Mustafabad, a hamlet of Daraganj, a suburb of

* Second Appeal No 910 of 1905, from a decree of W. J D Burkitt, Esq., officiating District Judge of Allahabad, dated the 23rd of June 1905, modifying the decree of Pandit Raj Nath, Subordinate Judge of Allahabad, dated the 16th of December 1904.

(1) Weekly Notes, 1906, p. 182.

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Allahabad, together with the sites of these houses. Thereupon the plaintiff Khair-ud-din Husain instituted the present suit as zamindar of the land upon which the houses stood asking for a declaratory decree that he was the owner and possessor of the houses in question and that they were not liable to be sold in execution of Bhaddar's decree. He further prayed that, in case of the sale of the materials of the houses being allowed, he should be declared entitled to "dhik" at the rate of Rs. 10 per cent. on the sale proceeds. He relied mainly on the following condition entered in the wajib-ul-arz:—"No tenant can build a new house without the permission of the zamindar, and after his abandoning the village, the zamindar is the owner of the materials of the house. In case of his presence (in the village) the tenant will be entitled to sell the materials (of the house) provided the house has been built at his own expense, and at the time of sale of the house the tenant shall pay a royalty, called *dhik*, to the zamindar at the rate of Rs. 10 per cent."

The Court of first instance (Subordinate Judge of Allahabad) dismissed the plaintiff's suit. On appeal by the plaintiff the District Judge set aside the decree of the first Court and decreed the claim of the zamindar so far as the sites of the houses were concerned. The defendant decree-holder appealed against this decree to the High Court.

Dr. *Tej Bahadur Sapru* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Babu *Jogindro Nath Chaudhri*) for the respondent (zamindar).

RUSTOMJEE, J.—The facts in this case arose as follows. Defendant No. 1 had obtained a decree against the father of defendant No. 2, a minor. Under this decree certain houses, situated in mohalla Daraganj of the city of Allahabad, were attached and advertised for sale, *with their site*, for the 17th September, 1904. Upon this the plaintiff, who is entered in the Government papers as zamindar of the land on which the houses were built, brought a suit for a declaratory decree that he was the owner and possessor of the houses in question, and that they were not liable to be sold in execution of that decree. He further prayed that, in case of the sale of the materials of the houses being allowed,

he should be declared entitled to *dhik* at the rate of Rs. 10 per cent. on the sale proceeds. He relied mainly on a condition which was entered in his wajib-ul-arz (record of rights); this is set out *in extenso* in paragraph 6 of the plaint and runs as follows:—"No tenant can build a new house without the permission of the zamindar, and after his abandoning the village, the zamindar is the owner of the materials of the house In case of his presence (in the village) the tenant will be entitled to sell the materials (of the house) provided the house has been built at his own expense, and at the time of sale of the house the tenant shall pay a royalty, called *dhik*, to the zamindar at the rate of Rs. 10 per cent."

In the result the Court of first instance dismissed the plaintiff's suit on the ground that as the minor defendant and his predecessor in title did not come in the category of cultivators, or *riyaya*, of the plaintiff, the terms of the wajib-ul-arz could not apply to them. It also held that the defendants had "proved by very reasonable oral and documentary evidence that along with the site, the houses in Daraganj had been constantly sold within 35 years before this day, and the zamindar never obtained any right in respect of the site of the old houses." Upon this the plaintiff preferred an appeal to the Court of the District Judge. That officer agreed with the Court of first instance in holding that the custom entered in the wajib-ul-arz could not apply to the houses in question. He, however, came to the conclusion that the plaintiff was entitled to the declaration sought by him as regards the site of the houses, and hence he gave him a qualified decree declaring that the site was not saleable. This has led to the present second appeal of defendant No. 1, who was decree-holder in the original case. The portion of the District Judge's judgment which deals with this question of the site runs as follows:—"With regard to the site other considerations come in. There is no proof how the houses came to be built. The site is admittedly in the zamindari of the plaintiff. In the absence of evidence I must assume that the houses were built with the expressed, or implied, consent of the plaintiff or without his knowledge. Had he objected, and the defendant's predecessors persevered in spite of his objection, a question of adverse possession

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might arise. But the burden of the proof of such objections would lie with the defendant. Proceeding under this assumption I cannot find how the plaintiff has lost or the defendant acquired proprietary rights in the site." I am unable to agree with the proposition set down here. It seems to me that the question regarding the site of the houses stands on the same footing as that of any other land, which has been continuously in the possession of a man for twelve years or more. If the proprietor of such land sleeps over his rights and allows a stranger to continue in undisturbed possession of it for twelve or more years without exercising any of his rights of a landlord, then that man undoubtedly obtains an indefeasible title to the land. In the present case it is admitted before us that defendant No. 2 and his predecessors in title have been in continuous possession of the site of the houses for considerably over twelve years as owners. I am of opinion then, that this possession must be looked upon as adverse and that it has given the defendant an absolute title to the land. I consider, therefore, that the site of the houses is legally capable of sale under the decree obtained by defendant No. 1. This appeal might accordingly be allowed and the decree of the appellate Court might be set aside, that of the Court of first instance being restored.

STANLEY, C.J.—I agree in the conclusion at which my brother Rustomjee has arrived. The question before us, it appears to me, must be determined upon the proper inferences to be drawn from the facts, which are not in dispute. It is admitted that the site of the house in dispute lies within the ambit of the plaintiff's zamindari. It is also admitted that the house was built many years ago and that neither the owner of it nor any of his predecessors in title ever paid any rent for it, nor gave any acknowledgment of his title to the zamindar, nor carried on any trade, such as that of carpenter, blacksmith, etc., for the carrying on of which sites in the *abadi* of a village are usually granted by the zamindar free of rent. It is also admitted that the property lies within the Municipal limits of the city of Allahabad. It seems to me that the reasonable inference from the long uninterrupted possession and enjoyment of the property by Bhola and his predecessors in title is that they acquired the absolute

ownership of the site. If they did not acquire it by a grant from the zamindar, they have acquired it by adverse possession. I would further point out that if we may presume that a license merely was granted by the zamindar to the predecessors in title of Bhola to build the house in question and they acting upon that license built the house, which is admittedly one of a permanent character, the zamindar, in view of section 60 of the Indian Easements Act could not revoke the license so granted. He could not revoke the license and require that the house be removed. I would, therefore, allow the appeal, set aside the decree of the District Judge and restore the decree of the Court of first instance.

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BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be reversed and the decree of the Court of first instance restored with cost in all Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

1906 *October* 25.

BHAGWAN SINGH *v.* HARMUKH AND ANOTHER.*

Criminal Procedure Code, section 250—Frivolous complaint—Jurisdiction—Complaint dismissed without issue of process.

Held that section 250 of the Code of Criminal Procedure is not applicable to a case in which a complaint is dismissed without any process being issued for the attendance of the person against whom such complaint is made.

IN this case Bhagwan Singh laid a complaint against Harmukh and Baldeo in the Court of a Magistrate of the first class, charging them with the commission of an offence under section 457 of the Indian Penal Code. The Magistrate, after making an inquiry under section 202 of the Code of Criminal Procedure, but without issuing any process against Harmukh and Baldeo, dismissed the complaint. At the same time he directed the applicant to pay to Baldeo and Harmukh Rs. 50 each to "compensate them for their illegal arrest." Bhagwan Singh applied in revision against this order to the Sessions Judge, who, being of opinion that an order under section 250 of the Code could not legally be passed under the circumstances of the case, made this reference to the High Court.

* Criminal Reference No. 574 of 1906.

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BHAGWAN SINGH v. HARMUKH.

The following order was passed :—

AIKMAN, J.—The applicant filed a complaint in Court charging Harmukh and Baldeo with an offence under section 457 of the Indian Penal Code. The Magistrate, without issuing process for the attendance of the persons complained against, dismissed the complaint under section 203 of the Code of Criminal Procedure, and under section 250 ordered the complainant to pay Rs. 50 compensation to each of the persons complained against. In my opinion the order is not justified by the terms of section 250, inasmuch as there was neither an order discharging nor an order acquitting the accused. I may add that the reasons given by the Magistrate for holding the complaint to be false are not to my mind at all convincing. I set aside the order of the Magistrate directing Bhagwan Singh to pay compensation. Any amount paid under that order must be refunded to him.

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November 10.

APPELLATE CRIMINAL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Rattigan.

EMPEROR *v.* SUGHAR SINGH AND ANOTHER.

Act No. I of 1872 (Indian Evidence Act), section 114—Presumption—Possession of stolen property.

Held that the finding in the possession of a person six months after the commission of a dacoity of articles stolen in that dacoity, such articles consisting of jewelry of a very ordinary type and by no means distinctive appearance, is not sufficient to form the basis of a conviction for participation in the dacoity. *Queen-Empress* v. *Burke* (1) and *Isu Shekh* v. *Queen Empress* (2), referred to.

On the 10th of March 1905, a dacoity was committed in the house of one Latore in a village in the district of Jhansi. In September of the same year the houses of Sughar Singh and Nethi, two subjects of the Gwalior state, were searched on suspicion of their being concerned in another dacoity. In Sughar Singh's house a pair of bangles and a frontlet were found, which were subsequently identified as having belonged to Latore. In Nethi's

* Criminal Appeal No. 443 of 1906.

(1) (1884) I. L. R., 6 All., 224. (2) (1895) I. L. R., 11 Calc., 160.

house nothing was found, but in an empty house adjoining it were found a pair of earrings and a necklet which were identified as the property of Latore. On this evidence, which was the only evidence to connect the two men with the dacoity of the 10th March 1905, Sughar Singh and Nethi were convicted by the Sessions Judge of Jhansi under section 395 of the Indian Penal Code. Against this conviction they appealed to the High Court.

Mr. *G. W. Dillon*, for the appellants.

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown.

STANLEY, C.J., and BURKITT, J.—This is an appeal of two persons, namely, Sughar Singh and Nethi, who were convicted by the learned Sessions Judge of Jhansi of the offence of dacoity punishable under section 395 of the Indian Penal Code. The dacoity in respect of which these persons were convicted took place on the 10th of March 1905. The only evidence to connect the appellants with the crime lay in the fact that about six months after the date of the dacoity, namely, in September 1905, certain ornaments which were proved to have been carried away in the dacoity were found in the house of Sughar Singh, and other ornaments were found in an empty house adjoining the house of Nethi. The ornaments found in the house of Sughar Singh consisted of a pair of bangles and a frontlet, and in the empty house adjoining the house of Nethi a pair of earrings and a necklet were also found. The learned Sessions Judge convicted the appellants of dacoity holding that he was justified under the provisions of section 114 of the Evidence Act in presuming that they took part in the dacoity from the fact that property proved to have been stolen in the dacoity was found in their possession and was not accounted for. The illustration allowing the presumption which the learned Sessions Judge deemed applicable to the case runs as follows:—

"That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

An important word in the illustration is the word "soon." In the case of the appellants the goods which were found in their possession were not found until six months from the date of the dacoity had elapsed. It appears to us that it is impossible to say,

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particularly having regard to the nature of the ornaments which were discovered, which are of a very common description and would readily pass from hand to hand, that the case is covered by the illustration in question. In view of the length of time which elapsed from the date of the dacoity, we do not think that the appellants ought to have been called upon to explain their possession of the articles. We have not been referred to any case in which the presumption which may be raised under section 114 was raised where goods were found after such a lapse of time. In the case of *Queen-Empress* v. *Burke* (1) it was held that the persumption did not arise in a case in which a stolen pocket handkerchief was found in the possession of the accused more than a month after the date of the theft. Again, in the case of *Ina Sheikh* v. *Queen-Empress* (2), in which a common brass drinking cup was stolen in October 1883 and was found in the possession of the accused in September 1884, it was held that the possession was not such recent possession as came within the purview of the illustration and that the presumption against the accused was so slight that taken by itself he ought not to have been called upon to explain how its possession was acquired. We consider it unnecessary to consider the question whether in view of the fact that Sughar Singh and Nethi are not British subjects, they could be convicted of an offence under section 412 in respect of property found in their possession in Gwalior, but actually stolen in British India. We are of opinion that the evidence did not justify the conviction of these two appellants for the offence of dacoity, nor would it, if the charge had been altered into a charge under section 412, have justified a conviction under that section. We therefore allow the appeal, set aside the conviction of Sughar Singh and Nethi and, acquitting them, direct that they immediately be released.

(1) (1884) I. L. R., 6 All., 224. (2) (1885) I. L. R., 11 Calc., 160.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1906
November 14.

EMPEROR v. KHUSHALI AND ANOTHER.*

Act No. XLV of 1860 (*Indian Penal Code*), *sections* 230 *and* 420—*Definition*—"*Coin*"—*Uttering false coin*—*Cheating.*

Where the offence charged consisted of selling or pawning as genuine gold mohars of the reign of Shahjahan silver rupees of that reign which had been gilt or in some way covered over with gold, it was *held* that the offence would be that of cheating and not that of uttering false coin. A gold mohar of the reign of Shahjahan cannot be deemed to be "coin" within the meaning of section 230 of the Indian Penal Code, as it is not used for the time being as money. *Regina* v. *Bapu Yadav* (1) followed. *Queen* v. *Kunj Beharee* (2) distinguished

Two persons, Khushali a chamar, and Jwala a sonar, were committed for trial upon a charge under section 239 of the Indian Penal Code. The circumstances upon which the charge was based were that they had gone round to various persons of the village where they lived selling or pawning to certain residents of the village sundry coins which they alleged to be gold mohars of the reign of the Emperor Shahjahan. These coins were in fact silver rupees of that reign which had been coated with gold. The fact that the two accused had sold or pawned, as the case may be, the coins in question, was indisputable, as was the fact that they were not gold mohars; but the chamar pleaded that he know nothing about the coins not being genuine—he had merely been employed by the sonar to help to sell them; while the sonar also pleaded ignorance of the true nature of the coins, and said that they had been given to him to sell by another sonar of a neighbouring town. The two accused were acquitted by the Sessions Judge of Mainpuri, and against this order an appeal was preferred by the Local Government.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the appellant.

BANERJI and AIKMAN, JJ.—This is an appeal by the Local Government from an original order of acquittal passed by the Sessions Judge of Mainpuri. Khushali and Jwala were sent up by the Police upon a charge of cheating, in that they passed to certain persons as genuine gold mohars of the time of Shahjahan silver rupees of that reign which had been gilt or in some way

* Criminal Appeal No. 840 of 1906.

(1) (1874) 11 Bom. H. C. Rep., 172. (2) (1873) 5 N.-W. P., H. C. Rep., 187.

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coverd over with gold. The Magistrate, however, committed the accused to the Court of Session for trial for an offence punishable under section 239 of the Indian Penal Code, that is, for fraudulently delivering counterfeit coin with the knowledge that it was so. In our opinion, looking to the definition of the word "coin" as given in section 230 of the Indian Penal Code, a gold mohar of the reign of Shahjahan cannot be deemed to be a coin, inasmuch as it is not used for the time being as money. The same view was taken by the Bombay High Court in the case of *Regina* v. *Bapu Yadav and Rama Tulshiram* (1). In that case the Court had to consider whether a coin of the time of the Emperor Akbar came within the definition of "coin" as given in section 230 of the Indian Penal Code. The learned Judges held that it did not, as it was not a current coin. With this view we agree. We were referred to the case of *Queen* v. *Kunj Behuree* (2). We think that case is distinguishable, as the coins in question in that case, namely, Kuldar and Jeypore mohars "were still in circulation as a medium of exchange." That cannot be said of the mohars of the reign of the Emperor Shahjahan. If the accused committed any offence, it was the offence of cheating and not an offence under Chapter XII of the Indian Penal Code. Although we do not agree with the learned Sessions Judge that it was not proved that the accused had passed the coins, the evidence to bring home guilty knowledge to them is so extremely meagre that we do not deem it right to order their retrial for the offence of cheating. We accordingly dismiss the appeal. The accused if in custody must be at once released.

(1) (1874) 11 Bom. H. C. Rep., 172. (2) (1873) 5 N.-W. P. H. C., Rep., 187.

APPELLATE CIVIL.

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November 14

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

SHIAM SUNDAR LAL (OPPOSITE PARTY) v. KAISAR ZAMANI BEGAM, (APPLICANT)*.

Civil Procedure Code, section 583—Execution of decree—Restitution of property sold in execution of a decree reversed in appeal—Procedure.

In a suit for a declaration that certain property belonged to the defendant judgment-debtor the plaintiff decree-holder obtained a decree and proceeded on the strength thereof to sell the property. In appeal, however, this decree was reversed. The rightful owner of the property sold then applied to the Court for restitution of the property. *Held* that whether the application could or could not be considered as one falling strictly within the terms of section 583 of the Code of Civil Procedure, the applicant was entitled to restitution. *Radhey Singh* v. *Mangni Ram* (1) referred to.

IN execution of a decree for money the decree-holder attached certain property as belonging to his judgment-debtor. After the attachment the decree-holder assigned the decree to one Shiam Sundar Lal. The assignee attempted to bring the attached property to sale, but was resisted by one Kaisar Zamani Begam who claimed to be a transferee of the property. The result was that the objector's plea was allowed and the property released from attachment. The decree-holder then brought a suit to have the property declared liable to sale in execution of his decree. In this he was successful and the property was brought to sale. Subsequently, however, the declaratory decree was set aside on appeal. The objector then applied for restoration of the property, which the decree-holder had purchased. The Court of first instance (Subordinate Judge of Bareilly) allowed this application. The decree-holder thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *B. E. O'Conor*, for the respondents.

KNOX and RICHARDS, JJ.—In this case the appellant as representative of one Muhammad Husain had a decree originally obtained against one Lalji Mal. Certain property was attached and directed to be sold. The present respondent objected that the property had become vested in her and was not liable to be sold in execution of the decree. The objection was allowed and

*First Appeal No. 55 of 1906 from a decree of Pandit Pitamber Joshi, Subordinate Judge of Bareilly, dated the 2nd of December 1905.

(1) (1902) 6 C. W. N., 710.

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the decree-holder instituted a suit for a declaration that the property was liable to sale in execution of the decree. The Court of first instance decreed this suit and the decree-holder proceeded to sell and did sell the property. The defendant, however, appealed, and on appeal the decree of the Court of first instance was set aside and the respondent in this suit established her right to the property. She now seeks to be restored to the property, which admittedly was sold in execution of the decree of the Court of first instance which has been set aside on appeal. The learned Subordinate Judge has treated the application as one made strictly under the provisions of section 583 of the Code of Civil Procedure and has decided that the application was properly made under the provisions of that section. The appellant, however, contends that that section cannot apply to a decree which was merely declaratory in its nature and not capable of execution. The respondent's counsel on the other side relies on the inherent jurisdiction of the Court to restore a party to the position he occupied before that position was lost in execution of a decree of Court subsequently set aside. We consider that, whether the order appealed from could be made under the provisions of section 583 or by virtue of the Court's inherent jurisdiction, the order was a right and proper order and that the respondent is entitled to be restored to the property sold in execution of the decree. The principle involved was discussed in the case of *Radhey Singh* v. *Mangni Ram* (1). In the course of the judgment, after referring to the authorities, the following passage occurs:—

"The principle on which the Courts have proceeded is that when there has been a wrong done by an order of a Court passed, which has been set aside on appeal, the Court executing the final decree, without express authority of law, is competent to put the parties into the position that they occupied before that order." We consider that this principle is applicable to the present case, and that it is absurd almost to contend that the respondent ought now to bring a fresh suit for possession of the property which she seeks to be restored, which would be a suit completely parallel to that which has already been brought by the decree-holder. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1902) 6 C. W. N., 710.

1906
November 15

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BHAGWAT KURI AND OTHERS (PLAINTIFFS) *v.* BALDEO RAI AND OTHERS (DEFENDANTS).*

Regulation XVII of 1806, *section* 8—*Mortgage by conditional sale—Foreclosure—Parwanah—"Official signature"—Procedure.*

Held that a *parwanah* or notification to the mortgagor, issued in a suit for foreclosure of a mortgage by conditional sale under the provisions of section 8 of Regulation XVII of 1806, which bore the seal of the Court and the initials of the Judge of the Court from which it issued, was a good and sufficient notification within the meaning of the Regulation. *Madhopersad* v *Gajadhar* (1) distinguished. *Kubra Bibi* v. *Wajid Khan* (2) *quoad hoc* overruled.

IN this case the plaintiffs sued for enforcement of lien by sale of hypothecated property or in the alternative for recovery of possession as mortgagees, on the strength of three documents executed in November 1878, December 1878 and May 1880. The contesting defendants resisted the suit as prior mortgagees by conditional sale. Their deeds were of the years 1869 and 1876. In 1877 they took foreclosure proceedings under section 8 of Regulation XVII of 1806, and in 1880, owing to certain disputes with the mortgagors, had to institute a regular suit and got a decree for foreclosure. The Court of first instance (Munsif of Ghazipur) held that all the three documents upon which the plaintiffs based their claim were executed *pendente lite* and were therefore incapable of enforcement against the property. That Court accordingly dismissed the plaintiffs' suit. An appeal by the plaintiffs to the District Judge was dismissed. The plaintiffs thereupon appealed to the High Court.

Maulvi *Abdul Majid* and Munshi *Govind Prasad*, for the appellants.

Mr. *M. L. Agarwala* and Babu *Sitak Prasad Ghosh*, for the respondents.

STANLEY, C.J., and BURKITT, J.—In this appeal the sole question argued before us on behalf of the appellants touches the question of the validity of foreclosure proceedings taken under

*Second Appeal No. 293 of 1905 from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 19th of January 1905, confirming the decree of Babu Ram Chandi Saksena, officiating Munsif of Ghazipur, dated the 21st of June 1904.

(1) (1884) I. L. R., 11 Calc., 111. (2) (1882) I. L. R., 16 All., 52

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section 8 of Regulation XVII of 1806. That section directs that the Judge on receiving a written petition from a mortgagee or holder of a deed of conditional sale for the foreclosure of a mortgage shall cause the mortgagor or his legal representative to be furnished with a copy of the petition and shall at the same time "notify to him by a *parwanah* under his seal and official signature" that if he shall not redeem the property mortgaged in the manner provided by the preceding section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive. The appellants contend that the requirements of this section were not complied with, inasmuch as the *parwanah* which was issued by the Judge to the mortgagors, though it bore the seal of the Court and was in every other respect regular, did not bear on its face the full signature of the Judge but merely his initials. The *parwanah* bears the initials "J. W. P." and it is admitted that these are the initials of Mr. Power, the then presiding Judge. It is said that the initials of a Judge cannot be regarded as his official signature, and reliance has been placed by the appellants on the ruling of their Lordships of the Privy Council in the case of *Madhopersad* v. *Gajudhur* (1).

By the term "official signature" as used in the Regulation we understand the signature which a Judge usually adopts in signing *parwanahs* and other similar orders. Speaking generally, a signature is the writing of a person's name, or mark to represent his name, by himself or his authority, for the purpose and with the intention of authenticating a document as being that of the person whose name or mark is so written. Official documents are in these provinces very frequently signed merely by initials. In this Court judgments and orders are as a rule merely initialled by the Judges. No evidence has been laid before us to prove what was the usual official signature of the District Judges at the date when the *parwanah* in question was issued.

In the case of *Madhopersad* v. *Gajudhar*, the *parwanah* referred to therein did not bear the seal of the Court, but merely the initials of the Judge. In other respects also it did not

(1) (1884) I. L. R., 11 Calc., 111.

comply with the provisions of the Regulation; for example, it did not notify from what date the period during which redemption should be made began to run, and it neither was nor purported to be a copy of the petition for foreclosure, the furnishing of which to the mortgagor was essential. In fact there was no attempt made to comply with the requirements of the Regulation. In consequence of these defects the Privy Council held that the requirements of the Regulation had not been complied with. Their Lordships did not hold that if in all other respects the requirements of the Regulation had been complied with the fact that his initials only were signed by the Judge would be a fatal defect.

In the case of *Kubra Bibi* v. *Wajid Khan* (1) our brother Aikman drew the conclusion from the decision of the Privy Council that their Lordships declined to accept initials as an official signature within the meaning of section 8 of the Regulation. We do not think that this inference can be reasonably deduced from the language of their Lordships. Our view is that the requirement of the Regulation that the *parwanah* shall be under the seal and official signature of the Judge, in the absence of evidence to the contrary, ought, on the principle *omnia praesumuntur rite esse acta*, to be deemed to be satisfied by the affixing of the seal of the Court and the writing of the initials of the Judge, and that it would be unduly restricting the language of the Regulation if we were to hold otherwise.

We think therefore that the view taken by the Court below is correct and we dismiss the appeal with costs.

Appeal dismissed.

(1) (1893) I. L. R., 16 All., 59.

Before Mr. Justice Sir George Knox.

1906 *November 21.*

DIL KUNWAR (PLAINTIFF) *v.* UDAI RAM AND OTHERS (DEFENDANTS).*

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *section* 201—*Act No. I of* 1872 (*Indian Evidence Act*), *section* 4—*Evidence—Record of plaintiff's name as co-sharer—Presumption.*

The presumption enjoined by clause (3) of section 201 of the Agra Tenancy Act is not conclusive, even in a Revenue Court, but may be rebutted, as, for instance, by evidence showing that the plaintiff has not been in possession of the property in respect of which profits are claimed for more than twelve years before suit, and the defendants have openly denied the plaintiff's title for more than that period. *Nias Ali Khan v. Gobind Ram* (1) distinguished.

THIS was a suit for profits brought by one Musammat Dil Kunwar. The plaintiff alleged herself to be owner and sharer in the mahal. She did not specifically state in her plaint that she was a recorded co-sharer; but the defendants in their written statement admitted that the plaintiff's name had been entered in respect of the land in question about 22 years previously, although at the same time stating that she had never been in possession. The Court of first instance (Assistant Collector, Meerut) decreed the plaintiff's claim in part. On appeal the additional District Judge of Meerut found that the plaintiff's suit was barred by limitation and dismissed it. The plaintiff appealed to the High Court. There, on an issue remitted it was found that the plaintiff had not been in possession for more than 12 years and that the respondents had before that period denied openly her title.

Dr. *Satish Chandra Banerji* and Munshi *Gokul Prasad*, for the appellants.

Pandit *Mohan Lal Nehru*, for the respondents.

KNOX, J.—This appeal arises out of a suit brought by one Musammat Dil Kunwar in one of the Revenue Courts of Meerut against Udai Ram and others, respondents to the present appeal. The plaintiff alleges herself to be owner and sharer in a mahal. She does not in her plaint specifically say that she is a recorded co-sharer, but in the written statement filed by the respondents

* Second Appeal No. 171 of 1905 from a decree of E. A. Kendall, Esq., Additional District Judge of Meerut, dated the 24th of November 1904, modifying a decree of Munshi Asghar Ali, Assistant Collector of the first class of Meerut, dated the 6th of December 1902.

(1) F. A. f. O. No. 70 of 1904, decided May 22, 1905.

I find the following :—" The plaintiff's name was entered in respect of the land in question about twenty-two years ago, but since then the plaintiff has not at all come in possession of any sort up to this moment." This may fairly be interpreted as meaning that the plaintiff is recorded as having proprietary right in the mahal. The Court of first instance gave the appellant a decree for part only of the profits claimed. In appeal the Court below held that the plaintiff's claim was barred by lapse of time. Exception was taken to this finding in the memorandum of appeal filed in this Court, *vide* plea No. 1, and when that plea came to be argued I returned the appeal for a precise finding upon the issue whether or not the plaintiff had been in possession at any time within the 12 years immediately preceding the institution of the suit. The return made by the Court below is to the effect that the plaintiff has not been in possession of her share for many more than 12 years and the respondents have openly denied her right for more than the statutory period. To this finding no objection has been taken. But my attention to-day was drawn to the second plea in the memorandum of appeal. This plea is to the effect that under section 201 of the North-Western Provinces Tenancy Act, the plaintiff's name being recorded as a co-sharer, the Court was bound to presume that she was one, and the suit for profits should have been decreed, the defendant being left to his remedy by a Civil suit. In support of this plea the provisions of section 201 of the Tenancy Act, 1901, were put forward, as also an unreported judgment of this Court, *Niaz Ali Khan* v. *Gobind Ram*(1). On the strength of these two authorities it was contended that this Court had no alternative but to find that the plaintiff being recorded as having a proprietary right had such right, and that the only opportunity of that right being contested was by a suit in the Civil Court. Section 201, sub-section (3), enacts as follows :—" If the plaintiff is recorded as having such proprietary right, the Court shall presume that he has it, but nothing in this sub-section shall affect the right of any person to establish by suit in the Civil Court that the plaintiff has not such proprietary right." I do not find any definition of the words 'shall presume' in the Tenancy Act, but the words 'shall presume' are defined in the

(1) F. A. f. O. No. 70 of 1905 decided on 22nd May 1905.

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Indian Evidence Act, 1872. The legal meaning assigned to those words in the last named Act is that when it is directed that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. I cannot conceive that in the Tenancy Act these particular words have any higher force than the similar words contained in the Evidence Act. On the other hand, it is easy to conceive a case in which to hold that when the Court has a record before it, it is compelled to accept blindly a fact in the teeth of rebutting evidence, would lead to an unnecessary multiplication of suits. For instance, a Court might have before it a village record in which it was recorded for one particular year that the plaintiff had proprietary right, and for the year immediately preceding and immediately following he was not so recorded, and the patwari who had the record made might swear that the matter recorded was a clerical error, or some other overwhelming evidence might be put forward showing that it was a clerical error; is the Court to go on to decree profits to the recorded proprietor and to refer the other side to a civil suit to establish that the recorded proprietor had no proprietary right? In this case the fact that the plaintiff has proprietary right has been disproved and the presumption falls to the ground. With regard to the case of *Niaz Ali Khan* v. *Gobind Ram*, as I understand that case the plaint did not set out that the plaintiff was a recorded co-sharer. The defence made no allusion to any record and no record was put before the Court of first instance. In appeal the lower appellate Court permitted such record to be put in evidence and upon that record found that the appellant was entitled to receive profits on the share recorded in his name. In appeal in this Court the record was attacked as being not admissible in evidence and it was ruled that it was a record having force under sub-section (3) of section 201 of the Tenancy Act, and I take the decision of this Court to go no further than to say that the lower appellate Court was right in presuming upon the record that the plaintiff had a proprietary right. In other words, the fact was recorded as proved because it had not been disproved. The appeal fails and is dismissed with costs.

Appeal dismissed.

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November 27.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HUSAINI BEGAM (PLAINTIFF) *v.* KHWAJA MUHAMMAD KHAN AND ANOTHER (DEFENDANTS).*

Contract—Marriage settlement—Construction of document—Agreement to pay annuity to bride.

On the occasion of the marriage of the plaintiff, then a minor, with the son of the defendant, the defendant agreed with the father of the plaintiff to pay to the plaintiff unconditionally the sum of Rs. 500 a month from the date of the marriage, and the payment of this allowance was made a charge upon certain immovable property specified in the agreement. The plaintiff after a time refused, for reasons stated by her in her plaint, to live with her husband. Subsequently to this, the stipulated allowance having been stopped, the plaintiff sued on the agreement above referred to to recover arrears amounting to Rs 15,000.

Held that the plaintiff, though not a party to the agreement in question, was entitled to sue on it; also, on a construction of the agreement, that, no conditions as to the conduct of the plaintiff being laid down therein, the fact that the plaintiff refused to live with her husband was no bar to the suit.

THIS was a suit to recover arrears of an annuity alleged to be payable under the following circumstances. On the occasion of the marriage of the plaintiff Husaini Begam with her husband, Rustam Ali Khan Nawab Khwaja Muhammad Khan, the father of Rustam Ali Khan, agreed with the plaintiff's father that in consideration of the marriage he would pay to the plaintiff Rs. 500 a month as pin money, described in the document which was subsequently drawn up as "pandan." It appears that this annuity was paid for a considerable time, but, owing to the fact that the plaintiff refused to live with her husband, or ceased to live with him, her father-in-law thought it fit to stop the payment of the annuity. The plaintiff sued to recover from her father-in-law arrears of the allowance due up to the end of October 1903.

A number of defences were set up in the Court below, the most important being that the plaintiff had ceased to live with her husband on account of quarrels and therefore was not entitled to the annuity, and that she had become unchaste and therefore had forfeited her rights in respect of it. It was also said that the agreement was illegal and opposed to public policy and was without consideration. Issues upon these defences were knit in the Court below, but all of them were determined in favour of

* First Appeal No. 258 of 1904 from a decree of Babu Rajnath Prasad, Subordinate Judge of Agra, dated the 16th of August 1904.

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the plaintiff, with the exception of the issue whether the plaintiff had ceased to live with her husband and so forfeited the annuity. The Court of first instance (Subordinate Judge of Agra) found that she had ceased to live with him, and on this ground that she had forfeited her right to the annuity. That Court accordingly dismissed the plaintiff's suit. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Dr. *Tej Bahadur Sapru*, for the appellant.

Mr. *Karamat Husain* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal by the plaintiff Nawab Husaini Begam, wife of Nawab Rustam Ali Khan, against the decree of the Subordinate Judge of Agra, dated the 16th of August 1904, dismissing her suit. On the occasion of the marriage of the plaintiff with her husband, Nawab Khwaja Muhammad Khan, the father of Rustam Ali Khan, agreed with the plaintiff's father that in consideration of the marriage he would pay to the plaintiff Rs. 500 a month as pin money, described in the document which was subsequently drawn up as "pandan." It appears that this annuity was paid for a considerable time, but, owing to the fact that the plaintiff refused to live with her husband, or ceased to live with him, her father-in-law thought it fit to stop the payment of the annuity. The amount claimed is for arrears due up to the end of October 1903.

A number of defences were set up in the Court below, the most important being that the plaintiff had ceased to live with her husband on account of quarrels and therefore was not entitled to the annuity, and that she had become unchaste and therefore had forfeited her rights in respect of it. It was also said that the agreement was illegal and opposed to public policy and was without consideration. Issues upon these defences were knit in the Court below, but all of them were determined in favour of the plaintiff, with the exception of the issue whether the plaintiff had ceased to live with her husband and so forfeited the annuity. The learned Subordinate Judge found that she had ceased to live with him, and on this ground that she had forfeited her right to the annuity. His words are:—"I hold that if the plaintiff prove

unchaste or refuse to live with her husband, there is no obligation on her father-in-law to pay her any allowance;" and further on:—"In this present case unchastity has not been legally proved, but her refusal to live with her husband is most satisfactorily proved, and I therefore hold that she is not entitled to her allowance." Now the agreement to pay the annuity was embodied in a document which has been adduced in evidence. It is dated the 25th of October 1877 and is very simple in its provisions. In it the defendant, Khwaja Muhammad Khan, after reciting that the marriage of his son Rustam Ali Khan, with the plaintiff had been fixed to take place on the 2nd of November 1877, declares that he will continue to pay Rs. 500 per month in perpetuity to the plaintiff for pin money (pandan) from the date of the marriage, that is, from the date of the plaintiff's arrival at her husband's house, out of the income of certain property in the Agra district and a jagir in the Dholpur State which is specified in the document. Then follows a provision that neither the executant nor his heirs or representatives shall have power to object to the monthly payment and that the whole property shall be liable for the amount of it; and further that the plaintiff shall have power to recover the annuity from all the property in the Agra district and the property in Dholpur in whatever way she pleased. This is the substance of the document. Details of the property the subject of the charge are then given, and the signature of the executant is appended with that of several witnesses. The execution of the document is admitted and it is also admitted that arrears of the annuity are due in case there be any liability on foot of the agreement. It is to be observed that there is no condition whatever attached to the payment of the annuity. There is nothing said as to the chastity or unchastity of the plaintiff, nor is there any provision under which the executant can claim freedom from liability in case the plaintiff cease to live with her husband or by reason of any other act done by the plaintiff. We therefore fail to understand how the learned Subordinate Judge arrived at the conclusion that the fact that the plaintiff was not living with her husband relieved the defendant, Nawab Khwaja Muhammad Khan, from his obligation to satisfy his undertakings. He is in our opinion clearly wrong as to this.

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We may point out that the reason assigned by the plaintiff for her refusal to live with her husband is that he has been in the habit of entertaining a prostitute in his house and otherwise misconducting himself, and that it was owing to his misconduct that she left his house. Our attention was not called by either the learned Counsel or the Advocate for the respective parties to the evidence upon the record, nor was it indeed necessary to do so in view of the fact that the execution of the agreement for the payment of the annuity is admitted and payment is not alleged.

Mr. *Karamat Husain* on behalf of the respondent contended that the plaintiff was no party to the agreement of the 25th of October 1877, and that at the time when it was executed she was a minor, and that therefore she could not take advantage of its provisions and sue upon it. We do not think that there is any substance in this contention. The document was executed in pursuance of an agreement entered into between Khwaja Muhammad Khan, the father of the intended husband, and the father of the plaintiff, who was a child of tender years at the time. In consideration of the agreement the father and guardian of the plaintiff allowed the marriage to take place, and on the faith of it the marriage between the girl and Rustam Ali Khan was consummated. The document provides that the plaintiff shall have power to recover the amount of the annuity, and she is expressly named in the document as the person for whose benefit the agreement was executed. Under circumstances such as these it is idle, we think, to put forward the plea that the plaintiff cannot take advantage of a document which was executed solely for her benefit.

We therefore allow the appeal, set aside the decree of the Court below, and give a decree to the plaintiff for the sum of Rs. 15,000, with interest at the rate of 6 per cent. per annum from the 10th of November 1903 up to the date of payment, with costs. We also declare that the annuity is well charged upon the property mentioned in the plaint and specified in detail in the agreement so far as that property is situate in British India. If the amount of the decree with interest be not paid on or before the 1st of June 1907, we direct that the said property or a sufficient part thereof be sold for the satisfaction of the plaintiff's claim. The decree

will be drawn up in accordance with the provisions of section 88 of the Transfer of Property Act. The plaintiff appellant will have the costs of this appeal and also the costs in the Court below against all the defendants.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

1906
December 5.

HASHMAT-UN-NISSA BEGAM AND OTHERS (DEFENDANTS) *v* MUHAMMAD ABDUL KARIM (PLAINTIFF).*

Act No. VII of 1870 (Court Fees Act), section 17—Court fee—Suit embracing two or more distinct subjects—Claim on an agreement to sell with an alternative claim for pre-emption.

The plaintiff came into Court claiming in the first place specific performance of an alleged agreement to sell to him certain immovable property, and secondly, in the alternative, the enforcement of a pre-emptive right in respect of a mortgage of the same property executed by one of the defendants in favour of the other.

Held that the suit was within the meaning of section 17 of the Court Fees Act, 1870, a suit embracing two distinct subject matters and therefore chargeable with the court fee assessable upon each alternative relief separately.

THE suit out of which this appeal arose was one for specific performance of an agreement alleged to have been entered into between the defendant Musammat Hashmat-un-nissa Begam and Musammat Zainab-un-nissa Begam and the plaintiff on the 27th of July 1902. In the alternative, the plaintiff prayed for a declaration that he was entitled to pre-empt a mortgage executed after the alleged agreement for purchase, on the 17th of September 1902. The plaintiff alleged that on the 27th of July 1902 Musammat Hashmat-un-nissa Begam along with Musammat Zainab-un-nissa Begam, her sister, entered into an agreement with him for the sale of 2 biswas of the village of Sheikhpur. The share which belonged to Hashmat-un-nissa was attached in execution of a decree, and in consequence of this, as the plaintiff alleged, it was agreed that the sale of the share of Zainab-un-nissa should be carried out forthwith, and that the sale of the share of Hashmat-ur-nissa should be completed when permission was

* First Appeal No 240 of 1904 from a decree of Maulvi Muhammad Shafi, Additional Subordinate Judge of Moradabad, dated the 30th of July 1904.

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obtained from the Court of the Subordinate Judge for the sale of that share under the provisions of section 305 of the Code of Civil Procedure. In spite of this agreement, the plaintiff alleged, Hashmat-un-nissa entered into an agreement with the defendants Musammat Rukia, Musammat Kubra and Alim-ud-din for a mortgage of her share in the village to secure a sum of Rs. 8,000. As a matter of fact a mortgage was executed in favour of these parties on the 17th of September 1902, and the mortgagees were put into possession, the mortgage being a usufructuary mortgage.

The Court of first instance (Subordinate Judge of Moradabad) held that the defendant Hashmat-un-nissa had entered into a binding agreement for the sale of her share, and gave the plaintiff a decree for specific performance. In regard to the claim for pre-emption the learned Judge came to no decision, holding that it was unnecessary to do so in view of his decision on the first question.

The defendant Hashmat-un-nissa, as also her mortgagees, appealed against this decision to the High Court.

Maulvi *Abdul Majid* for the appellants.

Mr. *Wallach* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal has occupied a considerable time. The learned counsel for the respective parties have opened up before us and discussed carefully all the points which could be urged on behalf of their clients. The suit was one for specific performance of an agreement alleged to have been entered into between the defendant Musammat Hashmat-un-nissa Begam and Musammat Zainab-un-nissa Begam and the plaintiff on the 27th of July 1902. In the alternative, the plaintiff prays for a declaration that he is entitled to pre-empt a mortgage executed after the alleged agreement for purchase, on the 17th of September 1902. The plaintiff's case is as follows:—He alleges that on the 27th of July 1902 Musammat Hashmat-un-nissa Begam along with Musammat Zainab-un-nissa Begam her sister, entered into an agreement with him for the sale of 2 biswas of the village of Sheikhpur. The share which belonged to Hashmat-un-nissa was attached in execution of a decree and

in consequence of this, as the plaintiff alleges, it was agreed that the sale of the share of Zainab-un-nissa should be carried out forthwith, and that the sale of the share of Hashmat-un-nissa should be completed when permission was obtained from the Court of the Subordinate Judge for the sale of that share under the provisions of section 305 of the Code of Civil Procedure. In spite of this agreement, the plaintiff says, Hashmat-un-nissa entered into an agreement with the defendants Musammat Ruqia, Musammat Kubra and Alim-ud-din for a mortgage of her share in the village to secure a sum of Rs. 8,000. As a matter of fact a mortgage was executed in favour of these parties on the 17th of September 1902, and the mortgagees are in possession, the mortgage being a usufructuary mortgage.

The learned Subordinate Judge held that the defendant Hashmat-un-nissa had entered into a binding agreement for the sale of her share, and gave the plaintiff a decree for specific performance. In regard to the claim for pre-emption the learned Judge came to no decision, holding that it was unnecessary to do so in view of his decision on the first question.

The defendant Hashmat-un-nissa, as also her mortgagees, have preferred the present appeal against this decision. Throughout Hashmat-un-nissa denied that she had any knowledge of the agreement of sale, and indeed after careful consideration of the evidence it seemed to us impossible to hold that there was any binding agreement for sale. The learned counsel for the respondent recognized the difficulties in his way in supporting the decision of the Court below, and ultimately withdrew his prayer for specific performance and consented to the suit being dismissed so far as regards this relief. We think that no other course was open to him, the evidence failing to show that there was any binding agreement for the sale of the property. In addition to this there were other defects in the way of the respondent, the difficulty of surmounting which was apparent to his learned counsel.

Having withdrawn his prayer for specific performance the respondent falls back upon the alternative claim and asks the Court to consider the case made by him upon this branch of the suit. He is met, however, by the objection that the stamp paid

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on the plaint was insufficient in view of the provisions of section 17 of the Court Fees Act. That section provides that "where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaint or memorandum of appeal in suits embracing separately each of such subjects would be liable under this Act." A court fee was paid only in respect of the claim for specific performance. No fee was paid on the claim for pre-emption. Mr. *Wallach* ingeniously argued that the suit did not embrace two or more distinct subjects; that the claim was in reality a claim to recover possession of property either on the ground that the plaintiff was entitled to possession by reason of the agreement for sale or by reason of his right of pre-emption. When we look into the position of matters we find that this is not so. The claim for specific performance is a claim in respect of the proprietary interest in the land. Whereas under the claim for pre-emption the plaintiff respondent could only obtain such interest as the mortgagees of the defendant Hashmat-un-nissa possessed. Their claim in fact is to stand in the shoes of the mortgagee, taking over their bond and obtaining possession as usufructuary mortgagees. These two claims appear to us to be separate and distinct claims, and, as such, to fall within the purview of the section to which we have referred. This being so, the plaint having been insufficiently stamped, there is no alternative for us but to allow the appeal. We allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

1906

December 7.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BANWARI LAL AND ANOTHER (PLAINTIFFS) *v.* NIADAR (DEFENDANT).*

Act (Local) No II of 1901 (Agra Tenancy Act), section 201—Suit for profits—Receipt of profits within 12 years of suit denied—Plaintiffs recorded co-sharers—Burden of proof.

The plaintiffs—recorded co-sharers—sued another co-sharer for profits. The defendant pleaded that the plaintiffs or their predecessors in title had not received profits within twelve years preceding the institution of the suit, and that the suit was time-barred. *Held* that it was not for the plaintiffs to

*Second Appeal No. 852 of 1905, from a decree of Mr. A. C. Chatterji, Additional District Judge of Saharanpur, dated 23rd of January 1905, reversing a decree of Munshi Maksud Ali Khan, Assistant Collector of the first class, dated the 6th June 1904.

prove by evidence of receipt of profits within twelve years that the right subsisted; and that section 201 of the Agra Tenancy Act, 1901, raised a presumption in their favour. *Mihan Lal* v. *Badri Prasad* (1) referred to.

The plaintiffs in this case sued as recorded co-sharers to recover from the defendants who were other co-sharers in the village their share of profits. The defendants pleaded, *inter alia*, that neither the plaintiffs nor their predecessors in title had received any profits for more than 12 years preceding the suit, and that the claim was time-barred. The Court of first instance (Assistant Collector, Saharanpur) overruled this plea and decreed the claim in part against two of the defendants. One of these appealed. On this appeal the additional District Judge of Saharanpur set aside the decree of the Assistant Collector and dismissed the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit for profits brought by the plaintiffs, who are co-sharers in the village, against other co-sharers under chapter XI of the Tenancy Act, 1901. The first plea raised in answer to the claim was that the plaintiffs or their predecessors in title had not received profits within 12 years preceding the date of the suit, and that the claim was time barred. The Assistant Collector overruled this plea and decreed a part of the claim against two of the defendants. One of these appealed, and on his appeal the learned Additional Judge set aside the decree of the Court of first instance and dismissed the suit. The plaintiffs come here in second appeal. The learned Judge observes:—"It was for the plaintiffs to show that they or their predecessors had within twelve years from the institution of the suit collected any profits," and refers to two rulings. Those rulings were anterior to the passing of the Tenancy Act, 1901. We may also invite his attention to the recent decision of this Court in *Mihan Lal* v. *Badri Prasad* (1). The learned Judge has overlooked the provisions of section 201, sub-section (3), of the Tenancy Act, which

(1) (1905) I. L. R., 27 All., 436.

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provides that if the plaintiff is recorded as having the proprietary right entitling him to institute a suit under chapter XI, the Court shall presume that he has that right. We gather from the record that the plaintiffs are recorded co-sharers. Consequently the presumption referred to in the section arises in their favour, and it was not for them to prove, by evidence of receipt of profits within twelve years, that the right subsisted. It was for the defendant to rebut the presumption which the law raised in the plaintiffs' favour. For the above reasons we allow the appeal; set aside the decree of the Court below, and remand the case to the Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit it to its original number in the register and dispose of it according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

1906
December 11

Before Mr. Justice Banerji and Mr. Justice Ashman.

BENI PANDE AND OTHERS (PLAINTIFFS) v. RAJA KAUSAL KISHORE PRASAD MAL BAHADUR (DEFENDANT).*

Act (Local) No. II of 1901 Agra Tenancy (Act), section 199 - Determination by Revenue Court of question of proprietary title.—Res judicata.

Where in a suit filed in a Revenue Court a question of proprietary title is raised and the Court, acting under section 199 of the Agra Tenancy Act, elects to determine such question itself, such decision of the Revenue Court will operate as *res judicata* in respect of a subsequent suit in a Civil Court for determination of the same question. *Sahig Dube* v. *Bonka Dube* (1) followed.

THE defendant in this case in 1902 took proceedings in the Revenue Court to eject the plaintiffs on the ground that they were his tenants and that their lease had expired. He obtained an order for their ejectment, which the plaintiffs contested by appealing to the Commissioner and the Board of Revenue. The Board of Revenue confirmed the order for the plaintiffs' ejectment on the 2nd of October 1903. The plaintiffs then brought the present suit in the Court of the Subordinate Judge of Gorakhpur asking for a declaration that the property in suit was their

*First Appeal No. 272 of 1904, from a decree of Munshi Achhal Behari, Subordinate Judge of Gorakhpur, dated the 17th of August 1904.

(1) Weekly Notes, 1907, p. 1.

abadkari property; that it was heritable and transferable, and that they were not liable to ejectment as ordinary lessees for a fixed period. The Court of first instance held that the status of the plaintiffs having already been determined by the Revenue Courts such determination precluded the plaintiffs from reagitating the same question in the Civil Court, and accordingly dismissed the suit. The plaintiffs thereupon appealed to the High Court.

Sir *Walter Colvin*, Mr. *M. L Agarwala*, Babu *Parbati Charan Chatterji* and Munshi *Haribans Sahai*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Munshi *Iswar Saran*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit brought by the appellants for a declaration that the property claimed was their *abadkari* property and was heritable and transferable, and that they were not liable to ejectment as ordinary lessees for a fixed period. Before the suit was brought the respondent sued the present plaintiffs in the Revenue Court for their ejectment from the land in question on the ground that they were his tenants holding under an expired lease. The present plaintiffs set up the defence that they were not the tenants of the respondent, but were subordinate proprietors They thus raised a question of title. On this question being raised, it was open to the Revenue Court under the provisions of section 199 of Act No. II of 1901 to adopt one of the two courses mentioned in that section. It could either require the defendants to institute a suit in the Civil Court for the determination of the question of title, or determine such question itself. It chose to follow the latter course and tried and determined the question of title. It came to the conclusion that the present plaintiffs were the tenants of the respondent, and passed a decree for their ejectment It was open to the present plaintiffs to appeal to the District Judge, and, if necessary, to the High Court, from the decision of the Revenue Court. But instead of doing so, they appealed unsuccessfully to the Commissioner and to the Board of Revenue and then brought the present suit in the Civil Court. The learned Subordinate Judge has held that such a suit is not maintainable and has dismissed it. The learned counsel for the appellants has addressed

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to us an able and ingenious argument in support of the contention that the suit is maintainable. The question which we have to determine in this case has already been decided by a Bench of this Court in *Sulig Dube* v. *Deoki Dube* (1). We are bound by that decision, and we see no reason to dissent from the view there expressed. The provisions of the Tenancy Act, 1901, are in this respect different from those of the old Rent Act No. XII of 1881. As we have already said, under the present Act the Court of Revenue is empowered itself to determine a question of title raised before it, and in determining such question the Revenue Court is required by sub-section (3) of section 199 to follow the whole of the procedure laid down in the Code of Civil Procedure for the trial of a civil suit. Reading that section with section 200, which empowers an appellate Court to refer issues, if necessary, to any subordinate Civil Court of competent jurisdiction, it seems to us that the Legislature intended that the decision of a Revenue Court upon a question of title, where it chooses to determine that question, should have the same effect as the decision of a Civil Court. It is true that the language used in section 199 of Act No. II of 1901 is not as explicit as that of section 112 of Act No. III of 1901. But we think that the intention of the Legislature was the same in both cases. Were we to accept the contention of the learned Counsel for the appellants, the result might be that a question of title determined by a Revenue Court with all the formalities of a civil suit and decided in appeal by the High Court after issues had been referred to a subordinate Civil Court might be reopened by a suit in a Munsif's Court. Such could never, we think, have been the intention of the Legislature. Following the decision referred to above, we hold that this suit was not maintainable and the Court below was right. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes, 1907, p 1.

1906
December 12.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt

GAYA DIN AND OTHERS (PLAINTIFFS) v KASHI GIR (DEFENDANT) *

Mortgage—Property mortgaged not at date of execution belonging to the mortgagor—Effect of subsequent acquisition by the mortgagor of such property.

The plaintiff in a pre-emption suit, in order to procure funds for the prosecution of his suit, executed a mortgage comprising certain property of which he was the owner and also the property the subject-matter of the suit for pre-emption. The suit for pre-emption was successful. *Held* that the mortgage took effect as regards the property the subject of the pre-emption suit from the time when the plaintiff mortgagor obtained possession by virtue of his decree in the suit. *Holroyd* v. *Marshall* (1), *Collyer* v *Isaacs* (2) and *Bansidhar* v. *Sant Lal* (3) referred to.

THIS was a suit for sale on a mortgage executed under the following circumstances. The mortgagor, in order to pre-empt a share in a village in which he was himself a co-sharer, required an advance of money. He borrowed Rs. 3,000 from the mortgagees, and to secure repayment mortgaged, as well as property of which he was already owner, the share which he was seeking to pre-empt. The mortgagor succeeded in his suit for pre-emption, and subsequently the mortgagees sued to recover their money seeking to bring to sale the pre-empted property. The Court of first instance (Subordinate Judge of Banda) gave the plaintiffs a decree for sale of the other property but excluded the pre-empted property upon the ground that the stipulation in the deed of mortgage that the pre-empted property should be considered as pledged and hypothecated as security for the mortgage debt could not amount to an actual mortgage nor could it create any charge upon the property in favour of the plaintiffs. The plaintiffs appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit for sale on a mortgage. The mortgagor, Kashi Gir was co-sharer in a village, and being desirous of pre-empting a sale of another share in the same village, required for that purpose an

* First Appeal No. 308 of 1904, from a decree of Rai Chandi Prasad, Subordinate Judge of Banda, dated the 22nd of September 1904.

(1) (1861) 10 H. L., at p. 210. (2) (1881) 19 Ch. D., 342.
(3) (1887) I. L. R., 10 All., 133.

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advance of money. He applied to the plaintiffs appellants for a loan of Rs. 3,000, and obtained this loan on the security of a mortgage on the 1st of March 1895. In this mortgage Kashi Gir hypothecated shares in two villages of which he was already owner and the document contained the following provision:—"Should I succeed in the pre-emption suit (that is, the suit which he had brought to pre-empt the share to which we have referred) and get possession of the 8 anna zamindari share sold, bearing a jama of Rs. 145 and situate, etc., etc., it shall also be considered to be pledged and hypothecated as security for this debt." Then follows an undertaking on the part of the mortgagor not to transfer or mortgage the share so sought to be pre-empted so long as the mortgage security subsisted. The mortgagor succeeded in his pre-emption suit. To raise the amount of the mortgage debt, the suit out of which this appeal has arisen was brought for sale of all the properties mentioned in the mortgage, including the share which was pre-empted. The learned Subordinate Judge gave a decree in respect of the properties of which the mortgagor was owner at the date of the mortgage, but refused to include in the decree the pre-empted property. The grounds which he assigns for this decision are that the stipulation in the deed providing that the pre-empted property should be considered as pledged and hypothecated as security for the mortgage debt, cannot amount to an actual mortgage, nor can it create any charge in favour of the plaintiffs upon the share in question.

We are unable to agree in the view which the learned subordinate Judge took upon this question. It appears to us that when the mortgagor acquired by pre-emption and got possession of the pre-empted property, equity treating that as done which ought to be done, gave the mortgagee a charge by way of mortgage upon the pre-empted share, and in fact, placed the plaintiffs as regards that property in the position of mortgagees. The principle which is applicable to a case of this kind is to be found in the well known case of *Holroyd* v. *Marshall* (1). That was the case of a mortgage of personal chattels, but the principle which is enunciated by their Lordships is of general application. Lord Westbury, L.J., observes (at pp. 210 and 211):—"It is quite true that

(1) (1861) 10 H. L., at p. 210.

a deed which professes to convey property which is not in existence at the time is as a conveyance void at law simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This of course assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract." In *Collyer* v. *Isaacs* (1) Jessel, M. R., upon the same subject observes:—"The creditor had a mortgage security on existing chattels and also the benefit of what was in form an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment in fact constituted only a contract to give him the after acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The principle enunciated in those cases was adopted by a Bench of this Court in the case of *Bansidhar* v. *Sant Lal* (2). In that case there was an hypothecation of future indigo produce and it was held that the hypothecation of the indigo became complete when the crop was grown and the produce realized. The principle is, in our opinion, equally applicable to the case of immovable as of movable property. We, therefore, hold that so soon as the defendant Kashi Gir obtained possession, under his pre-emption

(1) (1881) 19 Ch. D, 342. (2) (1887) I. L. R., 10 All., 133.

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decree, of the share of the property which he agreed to include in the mortgage, the mortgagees became entitled to the full benefit of the security of that share and to have an order for sale of it under the Transfer of Property Act in default of payment of the mortgage debt. We, therefore, allow the appeal, modify the decree of the Court below by including therein the 8 anna share in Rampur Tarhuan, which has been excluded by the Court below from the operation of the decree. The appellants will have their costs of the appeal from the defendant respondent.

Decree modified.

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March 28.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt

BISHAMBHAR NATH (DEFENDANT), *v.* SHEO NARAIN (PLAINTIFF).*

Hindu Law—Joint Hindu family—Ancestral family business—Liability of member of the family after severance of his connection with the family business.

A member of a joint Hindu family carrying on an ancestral family business upon attaining the age of majority completely severed his connection with the family business, nor was it shown that he ever ratified any of the transactions entered into by the family firm. *Held* that such member could on the failure of the family business only be made liable for its debts to the extent of his interest in the joint family property. He could not be held personally liable.

THE facts of this case are fully stated in the judgment of the Court.

The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, and the Hon'ble Pandit *Madan Mohan Malaviya* for the appellant.

Dr. *Tej Bahadur Sapru* and Pandit *Mohan Lal Nehru*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This is an appeal against so much of a decree of the Subordinate Judge of Cawnpore, dated September 24th, 1903, as makes the appellant personally liable under a decree of that date passed against him and other defendants.

The appellant and other members of his family constituted a joint undivided Hindu family, owners as such of trading and

* First Appeal No. 314 of 1903 from a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 24th of September 1903.

banking firms at Cawnpore and Lucknow. The firm at Cawnpore was known by the style of Jagat Nath Thandi Mal, and at Lucknow by that of Sheo Prasad Khazanchi. The principal defendant Lala Sheo Prasad Rai Bahadur was treasurer of the branches of the Bank of Bengal at Cawnpore and Lucknow, and had occupied that position for many years. It was on his appointment to be the treasurer at Lucknow that the firm of Sheo Prasad Khazanchi was established there. That firm failed and ceased to do any new business in the early part of 1902. The present suit was instituted by the plaintiff respondent to recover principal with interest due thereon, some Rs. 6,000 or thereabouts, deposited by him from time to time in the Lucknow firm of Sheo Prasad Khazanchi. The interest on the deposit was payable monthly, and the last payment on account of interest was in June 1902; the last deposit of principal was in October 1900. He has obtained a decree in full against all the defendants, and also a personal decree against the defendants, except those who had not attained majority. It is against this latter portion of the decree that the appellant Bishambhar Nath has instituted this appeal. He is the eldest son of the defendant Sheo Prasad Rai Bahadur.

In the early stages of this suit the date at which the appellant attained majority was hotly contested. It is now however admitted that he was born on November 9th, 1883, and so attained eighteen years of age on November 9th, 1901. It is contended on behalf of the defendant appellant that though his interest in the joint family property was liable to satisfy any lawful debts contracted by the firm during his nonage, he would not be personally liable for such debts unless it was shown that after attaining majority he had taken an active part in managing the business of the firm, and so might be considered to have ratified contracts entered into while he was still a minor.

Now ordinarily a personal decree against a member of a bankrupt firm would not be of much pecuniary value. But the appellant from the 1st of January 1903 was appointed in succession to his father to be treasurer of the Bank of Bengal at Lucknow and subsequently at other places, and to qualify himself for that position he had to deposit Rs. 50,000 with the Bank as security for the due performance of his duties. He had no money of his

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own; but his mother-in-law, Musammat Tulsha Kunwar, a wealthy resident of Muzaffarpur in Bengal, having, as one witness tells us, an income of one and three-quarter lakhs per annum, according to the appellant, paid in the Rs. 50,000 in his name and so enabled him to secure the appointment. The respondent's object, as appellant alleges, is to put pressure on his mother-in-law by attaching this Rs. 50,000 in execution of their personal decree and so compel her to discharge the debts of the bankrupt firm. We are told that the amount which Musammat Tulsha and other friends have advanced to the appellant to enable him to secure the appointment of treasurer at Lucknow and other places amounts to Rs. 1,70,000. The respondents and other creditors of the bankrupt firm want to lay hands on this money.

The burden of proving that the appellant had ratified and taken on himself the burden of personally discharging the liabilities contracted during his minority lay on the plaintiff. Up to the close of his case in the lower Court no evidence to that effect except that of Rudra Narain had been produced when on July 29th, 1902, the plaintiff respondent (Record No. 162) informed the Court that a quarrel had arisen between the defendant Suraj Prasad and his uncle Sheo Prasad, Rai Bahadur, father of Bishambhar Nath, one of the defendants to the suit, "in consequence of which Lala Suraj Prasad has made over documentary evidence to the plaintiff's pleader which would conclusively establish the fact that Lala Bishambhar Nath, defendant, continued to be a partner in the firm and the business of the firm styled Sheo Prasad Khazanchi, situate in Lucknow, even after attaining majority." After some objection the learned Subordinate Judge admitted these documents in evidence, and it is principally on them that he passed the personal decree against the appellant.

We now proceed to discuss this documentary "evidence" bearing in mind the sources whence it comes and the fact that the latest paper in it is dated in April 1902, within six months after appellant's attainment of majority, excepting one letter dated August 1902. The first of these papers to which we will allude is Record No. 171 bearing a Hindi date corresponding to

February 24th, 1902. It is headed "Proceedings of a meeting held at Lucknow." It is said by Suraj Prasad to be in his handwriting and in that of Sheo Prasad's, and to have been signed by Mathura Prasad. Suraj Prasad is the person who handed it over to the plaintiff's pleader. As to this document the learned Subordinate Judge, describing it as "a scheme for the management of the business at Lucknow," remarks that in it "it is stated that the duty of Bishambhar will be to attend the Bank." Now as to this, premising that there is no evidence *aliunde* to show that Bishambhar Nath was present at the meeting, though very probably he was present, in our opinion the learned Subordinate Judge is wrong in the inference he draws from this document. The first portion of it is simply a list of the names of persons present, the first being Lala Sahib "Malik" (mistranslated in the paper book), referring either to Sheo Prasad or his brother Tulshi Ram, the second being Suraj Prasad, the third one Mathura Prasad Bakhshi, and the fourth Chiranji (may he live long) Bishambhar Bankerji. No duty whatever is prescribed for Bishambhar Nath. His name is recorded simply as one of the persons present at the meeting. The duties are prescribed subsequently after the last name of those present. If attendance at the Bank were prescribed as appellant's duty, it would have been mentioned among the duties assigned to the others. On the original paper is the following:—"A sitting took place. Resolution adopted as follows:—So many (*utne*) men were present in Lucknow at the sitting." And then follows the list of names. This document in no way in our opinion strengthens the plaintiff's case. It is absolutely colourless. We next come to Record No. 152, a letter from appellant to his father, dated August 7th, 1902. We have no information as to the means by which Suraj Prasad obtained possession of this, a private letter from a son to his father. The comments made by the learned Subordinate Judge on this letter strike us as being rather extraordinary. He says:—"The letter shows how Bishambhar Nath at that early stage cherished the dishonest idea of defrauding the creditors of the firm, and he, though young, points out the mistake committed by his father in coming to Lucknow and promising to pay debts to several creditors thereby admitting the liability of his branch of the family

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to pay those debts." We cannot concur with the learned Subordinate Judge in his remarks. We see in the letter no indication of any dishonest desire on appellant's part to defraud the creditors of the firm. By the letter he appears to us to do no more than point out to his father how foolishly he was acting in coming to Lucknow and there making promises which he knew he could not perform. It is in fact a letter of useful advice concluding with an offer of his services. It is a document which should not have been tendered in evidence. There is also a fragment of a letter (Record No. 170) unsigned and undated, written by Bishambhar Nath to his father—how procured by Suraj Prasad we do not know—in which he transmits to his father certain communications which his father's legal adviser had desired to have sent to him. Neither of these letters in our opinion helps respondent's case in the slightest. We can gather from them no indication that the appellant took any—and much less an active—part in the management of the firm after he attained majority. The Subordinate Judge also refers to a letter of July 29th, 1902, but as it has not been printed, and we have not been shown either the original or a copy, and on neither side were any remarks addressed to us on it at the hearing of this appeal, we cannot say what were its contents. As to Janki Prasad's decree all we know is that it was paid off. Next we come to two promissory notes drawn in English, dated respectively November 8th, 1901, for Rs. 1,000 at ninety days, and March 15th, 1902, for Rs. 1,000 at fifteen days' date payable to the Bank of Bengal. Both were drawn by Sheo Prasad and one Ata Ali Khan. They were paid at maturity. There is nothing to connect them with the business of the firm of Sheo Prasad Khazanchi. They were probably only "kites" flown by the drawers. The first bears date one day before appellant attained his majority, and at the date of the second the firm of Sheo Prasad Khazanchi had ceased to issue hundis: neither of them is drawn in the name of that firm. They appear to be purely private transactions between the drawers and the payees. The Subordinate Judge mentions a third similar note, dated April 2nd, 1902, but as it has not been translated or laid before us by counsel on either side we know nothing about it. The only one of the two promissory notes shown to us which (being drawn after he had

attained majority) could affect the appellant is that of March 15th, 1902. This is not a hundi, it does not purport to be issued by the firm of Sheo Prasad Khazanchi, and is no more than a promissory note at fifteen days drawn by Sheo Prasad in his personal capacity and by Ata Ali Khan. Bishambhar Nath's signature is admittedly on this note. It is written on the left hand side margin of the note by appellant who was then working in the bank and is no more than an attestation of the signature of the drawers. The appellant swears that the words " by the pen of Bishambhar Nath " following the signature of Sheo Prasad were not written by him. He says they were not on the note when it was discounted and paid off, and that they were added by Suraj Prasad after the note had been returned by the Bank on payment. Suraj Prasad denies this, but considering the part taken in this litigation by him against his cousin the appellant, and that his handwriting and that of the appellant are very much alike, we are not inclined to give much credit to him Bishambhar Nath also says (and his assertion seems most probable) that the Bank would not discount a promissory note in which the signature of one of the drawers purports to have been written by another person. The third promissory note bearing date April 2nd, 1902, has (as already mentioned) not been printed. But from the deposition of the witness Queiros and from the matters mentioned by the Subordinate Judge the drawers appear to have been Ata Ali Khan and Sheo Prasad, the signature of the letter being in the handwriting of *Suraj Prasad*. We see no foundation whatever for the "irresistible inference" drawn by the lower Court that the words " by the pen of Bishambhar Nath " followed Sheo Prasad's name in this note and were there when the document was in the hands of the witness Queiros ; we think it to be highly improbable. But even if the facts were as surmised (in our opinion incorrectly) by the learned Subordinate Judge it would make no difference. This promissory note, as far as we can judge without having seen it, is of exactly the same kind as that of March 15th, 1902, that is to say, a transaction between Sheo Prasad and Ata Ali Khan with which the firm of Sheo Prasad Khazanchi had no concern. That firm also had for some months ceased doing any new business. We have no hesitation

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in finding that these three promissory notes do not show that the appellant took any part in the management of the business of the firm of Sheo Prasad Khazanchi of Lucknow.

We next turn to the evidence of one Rudra Narain, son of the plaintiff respondent. He used to go to the firm of Sheo Prasad Khazanchi in Lucknow monthly to draw the interest on his father's deposit. His evidence is to the effect that appellant lived in the kothi of Sheo Prasad (this is not unnatural seeing that Sheo Prasad was his father), and that when he went to receive the interest he on *every* occasion found Bishambhar Nath, Sheo Prasad, Suraj Prasad and Chandu at the place where the money used to be paid. This is an absurd statement. The witness probably meant that he found one or other of them. He "mostly found Bishambhar Nath." In September or October 1901 (before appellant had attained his majority) he only found the munib, but appellant came in and ordered him to be paid. He further states that in January, February, March, and probably in April, 1902, he met appellant in the kothi and that the latter said:—"Panditji is come, pay him the interest." In cross-examination he stated he could not remember which proprietor was present at the kothi on every occasion when he went to demand his interest. This is the *only* direct evidence of any interference on the part of appellant in the affairs of the firm of Sheo Prasad Khazanchi. If true, it carries but little weight, being but a solitary instance, and it is flatly contradicted by the evidence of Chadammi, an employé of the firm, and of Bindraban, one of the gumashtas who was called by the plaintiff respondent. We attach no importance to the uncorroborated evidence of Rudra Narain. The last piece of evidence for the respondent by which he seeks to establish his case against appellant is part of that generously supplied to his opponents by Suraj Prasad at the hearing on July 29th, 1903. It consists of no less than 62 pages of closely printed tabular matter described as the attendance register of servants and employés of the kothi from August 1899 down to June 1902. The fact that appellant's name is shown in this register is relied on as being conclusive proof that he took an active share in the business of the kothi. The learned Subordinate Judge describes this register wrongly as being one of the daily attendance of servants and

proprietors. The *heading* of the Register refers only to servants and employés, gomashtas and the like, and nowhere mentions proprietors. He says it "shows that Bishambhar Nath attended to the family business like his cousin Suraj Prasad." Appellant's name appears for the first time in the register for the month of May 1901, and appears to have been interpolated in that month along with that of one Ganesh Prasad, there being but one line for both names. The word "and" in the translation does not exist in the original. The witness Chidammi swore that this page is in the handwriting of Suraj Prasad, and Chidammi also swears that it was Suraj who caused appellant's name to be entered. It is to be noticed, however, that the appellant's name is entered in this and the following month among those who were employed at the Bank of Bengal and not in the business of the firm of Sheo Prasad Khazanchi. For July 1901 the register abruptly ceases on the 15th, and then we have a new register for the *whole* of July. It is of course impossible that this register (taken in hand only from the 15th) should be a *contemporaneous* daily record of attendance and yet it contains many matters previous to the 15th not entered in the discontinued register. The witness Chidammi gives us the names of the persons who wrote many of the registers. Appellant swears that none of the registers are in his handwriting. In this he is corroborated by Chidammi. In the attendance register for November 1901 there is a note on the margin purporting to have been made by appellant on *December* 10th to the effect that no attendance had been taken after the 23rd of November. The register, however, is completely filled up to the 30th. Appellant denies having written the note. Suraj Prasad swears that both the register for November 1901 and the note are in appellant's handwriting. Suraj Prasad also swears that the registers for several months, namely, November and December 1901 and January and February 1902 are in appellant's handwriting. Appellant denies it, and as he is corroborated by Chidammi, we believe him rather than Suraj Prasad. The bitter quarrel between Suraj Prasad and the other branch of the family and the extraordinary position taken up by him in supplying the respondent with evidence which he thought would damage appellant's case are in our opinion good

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reasons why we should give more credit to the statements of the appellant, especially where they are corroborated, than to the uncorroborated assertions of Suraj Prasad. On the whole we are of opinion that these registers in no way advance the respondent's case. We do not believe that the appellant had anything to do with keeping them, and at the utmost they do no more (if correctly kept) than show that appellant was at his father's house in Lucknow from May 1901. From other evidence we know that appellant began to attend at the Bank of Bengal from early in 1902 as his father's representative or deputy,—the Bank having refused to allow Suraj Prasad to continue to attend in that capacity and having refused him access to the Bank premises.

This concludes the evidence adduced by the respondent to prove his allegation that after attaining majority the appellant by an active participation in the management of the business of Sheo Prasad Khazanchi assumed responsibility for all existing contracts contracted during his minority, and held himself out to the world as one responsible for the liabilities of the firm. In our opinion, for reasons given in detail in respect of each piece of evidence, the respondent has wholly failed to establish his case. In but one instance—that of *this* respondent's debt, if we believe the evidence of Rudra Narain, plaintiff's son,—and we do not believe it—is any act of active management alleged during the brief period between November 9th, 1901, when appellant attained majority and the failure of the firm in May 1902. We think the respondent has failed to support the *personal* decree against appellant and that as far as it declares appellant *personally* responsible for the debts of the firm the decree must be set aside.

Appellant admits that his interest in the joint family property is liable and can be taken in execution of that decree. He has no other property. But he objects to a personal decree which will put in the grasp of the creditors property which never belonged to the bankrupt firm and which has been provided for him by his mother-in-law and other friends to give him a start in life.

There are some other matters as to which we are unable to agree with the lower Court. We fully believe the appellant's statements as to the pecuniary assistance he from time to time received from his mother-in-law and as to her having advanced

Rs. 50,000 for him. We see no reason to doubt the truthfulness of appellant's evidence as to his conversations with Mr. Logan, the then Agent of the Bank of Bengal at Lucknow, and Mr. Logan's suggestion that he should attend at the Bank with his father to learn the Bank work and a promise that if he showed himself competent he might be appointed to succeed his father. Mr. Logan was naturally anxious to know if Bishambhar Nath had any connection with the firm of Sheo Prasad Khazanchi, which was known to be shaky. The letter from the Secretary and Treasurer of the Bank of Bengal (Calcutta) of March 27th, 1901, corroborates and renders most probable appellant's evidence as to his conversation with Mr. Logan. There is evidence that appellant went to Lucknow in the middle of the year 1901, and did at once proceed to the Bank to learn his work there. And the letter also shows that the Bank insisted on Sheo Prasad putting in a new Deputy or Naib at the Bank. The then Deputy was Suraj Prasad, whose name appears so often in this case and to whose mismanagement it is said by some witnesses the failure of the firm of Sheo Prasad Khazanchi was due. The learned Subordinate Judge appears to entertain a not altogether correct idea of the position of the Treasurer of the Bank of Bengal at Lucknow. Sheo Prasad was appointed treasurer, not because he was a member of the joint family which posses ed the banking firm of Sheo Prasad Khazanchi—which did not then exist,—but because he was a person in whose commercial integrity the Bank had confidence and who was able to give Rs. 50,000 as security. The appellant was appointed Treasurer from January 1st, 1903, on similar grounds. He had fully learned his work to the satisfaction of Mr. Logan (the Bank's Agent) and his mother-in-law supplied the Rs. 50,000. In connection with this matter we notice the further observation of the lower Court that "as soon as the firm failed an attempt was made to make Suraj Prasad liable for all the debts and liabilities and get Bishambhar Nath exempted from liability so that he might continue the business in his own name as the new treasurer without being required to satisfy the debts of the defunct firm." What the learned Subordinate Judge exactly means by these words it is not easy to comprehend. There was no business to continue, as the firm of Sheo Prasad Khazanchi was extinct,

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and that business could not be "continued" by the appointment of appellant as Treasurer of the Bank of Bengal. We know of no attempt to make Suraj Prasad liable for the debts and to get Bishambhar Nath exempted. Both of them as members of a joint family were liable for all the debts, the only contention of appellant being that he is liable for those debts only to the extent of his interest in the joint family property, and is not personally liable. As we find that respondent has failed to make out any case establishing the personal liability of the appellant, we consider it unnecessary to discuss the questions of law raised by the learned Subordinate Judge and which were argued before us at the hearing of this appeal. We, for the above reasons, allow the appeal and set aside so much of the decree under appeal as renders the appellant Bishambhar Nath personally liable under it. Appellant is entitled to his costs in this Court.

Appeal decreed.

1906
December 13.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BISHAMBHAR NATH (DEFENDANT) v. FATEH LAL AND OTHERS (PLAINTIFFS)*

Hindu Law—Joint Hindu family—Family business—Liability of minor member of family for trade debts—Separate property.

Where a member of a joint Hindu family carrying on an ancestral family business upon attaining majority separates entirely from the family and the family business and thereafter acquires separate property such separate property cannot be made liable for the debts incurred by the family trading firm, but the interest of the separating member in the family property will alone be liable. *Chalamayya* v. *Varadayya* (1) followed. *Ram Lal Thakuredas* v. *Lakhmichand Muniram* (2), *Jokurra Bibee* v. *Sreegopal Misser* (3), *Bemola Dossee* v. *Mohun Dossee* (4) and *Lutchmanan Chetty* v. *Siva Prokasa Medelvar* (5) referred to. *Samalbhai Nathubhai* v. *Someshwar* (6) and *In the matter of Haroon Mahomed* (7) distinguished.

THE facts of this case are fully stated in the judgment in the preceding case, F. A. No. 314 of 1903, printed at page 166 *supra* and in this judgment.

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* First Appeal No. 317 of 1903 from a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Cawnpore, dated the 24th of September 1903.

(1) (1888) I. L. R., 22 Mad., 167.
(2) (1861) I. Bom., H. C. Rep., App., li.
(3) (1876) I. L. R., 1 Calc., 470.
(4) (1880) I. L. R., 6 Calc., 792.
(5) (1899) I. L. R., 26 Calc., 349.
(6) (1880) I. L. R., 5 Bom., 38.
(7) (1890) I. L. R., 14 Bom., 185.

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BISHAMBHAR NATH v. FATEH LAL.

The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and the Hon'ble Pandit *Madan Mohan Malaviya* for the appellant.

Mr. *A. E. Ryves* and Munshi *Gulzari Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal is connected with F. A. No. 314 of 1903 and several other appeals against decrees passed against the appellant and other defendants whereby the appellant is made personally liable for the amount of the decrees. The appellant and other members of his family constituted a joint and undivided Hindu family, owning as such an ancestral trading and banking firm at Cawnpore and Lucknow, the firm at Cawnpore being known by the style of Jagat Nath Thanti Mal and that at Lucknow by the style of Sheo Prasad Khazanchi. In our judgment delivered on the 28th of March 1906 in First Appeal No. 314 the circumstances under which the indebtedness arose are fully stated. The suit which has given rise to this appeal is one for recovery of a debt amounting to over Rs. 11,000, representing the balance due in respect of a number of hundis which were drawn by the defendant's firm on the plaintiffs' firm at Cawnpore styled Moti Lal, Fateh Lal. The defence of the defendant Bishambhar Nath to the suit was that he was never a partner in the firm of Jagat Nath Thanti Mal and had no concern with that firm. He also alleged that during his minority he severed connection with the ancestral business and family property, and that if it were found that any debt was due to the plaintiffs' firm he and his separate property could not be made liable therefor, inasmuch as the indebtedness was incurred at a time when he was a minor.

The Court below decreed the plaintiffs' claim, finding that Bishambhar Nath was a major at the time the debts sued for were incurred. It is now admitted that this was the case, Bishambhar Nath having attained majority on the 9th of November 1901. It also found, and it is admitted here, that the business of the firm of Jagat Nath Thanti Mal was a joint ancestral family business. The learned Subordinate Judge held that Bishambhar Nath did not repudiate connection with the business when he attained age, but on the contrary ratified the partnership and rendered himself liable in respect of its transactions.

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As we said in our judgment in F. A. No. 314 of 1903, a personal decree against a member of a bankrupt firm would ordinarily not be of much pecuniary value. In this case, however, it would be otherwise. The appellant was on the 1st of January 1903 appointed Treasurer of the Bank of Bengal at Lucknow and subsequently at other places, and to qualify himself for that position he was obliged to deposit with the Bank as security for the faithful discharge of his duties a sum of Rs. 50,000. He had no money of his own; but his mother-in-law Musammat Tulsha Kunwar, who is a wealthy lady of Muzaffarpur, deposited in the Bank in his name the requisite amount and so enabled him to secure the appointment. The object of the respondents, as the appellant alleges, is to put pressure on the appellant's mother-in-law by attaching this Rs. 50,000 in execution of a personal decree and so compel her to discharge their debt. We are told that sums amounting to no less than Rs. 1,70,000 have been placed to the credit of the appellant to enable him to secure the appointment of Treasurer at various places.

The Court below found that the appellant not only assisted his father in the work of the Bank but also managed the affairs of the ancestral business jointly with his uncle Saraj Prasad, both before and after he had attained majority, and that, so far from repudiating his connection with the family business, he by his acts adopted and ratified its transactions. In our judgment in F. A. No. 314 of 1903 we reviewed at considerable length the evidence upon which this decision was arrived at and it is unnecessary here to repeat it. We shall treat our remarks in that judgment as embodied in this judgment. The same evidence applies to both cases. The conclusion at which we arrived was that the plaintiff in that case had wholly failed to establish his case. We held that the defendant appellant took no active part in the business of the firm of Jagat Nath Thanti Mal after he attained majority; and that, so far from doing so, he kept himself aloof from all connection with it. He says in his evidence that he went to Lucknow in April 1901, that is, before he attained full age, and there met Mr. Logan, the Agent of the Bank of Bengal, who promised that if he learnt the treasury work in the Bank and qualified himself to look after it, he

would appoint him Treasurer. Mr. Logan, he says, asked him if he had any concern with his father's firm at Lucknow and Cawnpore and he replied in the negative. In a further deposition made on the 7th of May 1903 he stated that Mr. Logan at this interview told him that the post of Treasurer could not be given to any person having connection with his family business, and that he told Mr. Logan that he had severed his connection with the members of his family. The family business was, we may mention at this time, in a tottering condition. Chidammi Lal, who was in the employment of the firm of Lachmi Narain Suraj Prasad, deposed that when Khanun Lal died, Suraj Prasad, the uncle of the defendant appellant, took him (the witness) to Lucknow in April 1901 and there he remained for a year. He stated that the business was carried on under the orders of Suraj Prasad; that Bishambhar Nath did not interfere with the business of the firm, nor had he any concern with it. We are quite satisfied that the defendant appellant never took any active part in or had any concern with its management directly or indirectly after he attained majority.

Under these circumstances the question for determination is whether the defendant appellant can be held personally liable for debts incurred by the managing members of the ancestral family business after he attained majority.

To the extent of his share in the joint family property he does not dispute his liability, but he claims exemption from payment of those debts out of separate property which came to him from his mother-in-law and other friends after the ancestral firm had ceased to do business. The transactions in respect of which the defendant is sued were entered into between the plaintiffs and the manager of the ancestral business, and there is nothing to show that the appellant was aware of, much less that he ratified or adopted these transactions. On the contrary, the evidence shows that he designedly abstained from taking any part in the business and kept aloof from it. There is no conduct on his part which could have led the plaintiffs to believe that in their dealings with the manager the appellant was a contracting party. They dealt with the manager as they had been previously dealing with him as a person carrying on an ancestral family business on the

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credit of the joint family property. They could not have dealt with the firm on the credit of appellant's private separate estate, for it was after the date of the hundis sued on that appellant's mother-in-law put him in funds to take up the office he now holds in the Bank of Bengal in Lucknow. Before that time he possessed nothing but his interest in the family joint estate, the liability of which he does not dispute. The question then is, can a manager who carries on a family business pledge, not merely the family joint credit but also the separate estate which an individual member of the family may subsequently acquire? We are not aware of any authority for an affirmative answer to this question. In the two cases upon which reliance was placed by Mr. *Ryves* on behalf of the plaintiffs respondents, the persons who were held liable were considered to have by their conduct constituted themselves partners. In the case of *Sumalbhai Nathubhai* v. *Sameshvar* (1) Melvill, J., in delivering the judgment expressly guarded himself in regard to this question. "Whether," he observed, "a Hindu who becomes entitled by inheritance to a share in a trading business is *ipso facto* and without his own consent involved in all the liabilities of a partner it is unnecessary for us to determine." In the other case, entitled *In the matter of Haroon Mahomed* (2) it was held that the insolvent Haroon Mahomed had taken an active part after he attained age in the management of the business of the partnership. In the course of his judgment Sarjent, C.J., observes:—"The petitioning creditors alleged that his (*i.e.*, Haroon's) father took a principal part in managing the firm up to the time of his death and since that time Haroon has taken his place. It appears that since then, at all events, Haroon has kept up an intimate connection with the firm. He has raised money for it. He has paid money into the Bank for it and drawn money out for it. He has lived with the other members of his family, who are admittedly members of the firm. He does not disclose how he is supported if he draws no profits out of the firm, as a partner, for his maintenance." In that case a very different state of facts from those in the present case is disclosed.

(1) (1880) I. L. R., 5 Bom., 38. (2) (1890) I. L. R., 14 Bom., 189.

We are not aware of any case, and none has been cited to us, in which it was held that persons carrying on a joint family business have authority to pledge the credit of each member of the family in his individual and separate capacity. Authority to pledge the joint family property and property acquired with funds derived from the joint business undoubtedly exists. In *Ram Lal Thakursidas* v. *Lakhmichand Muniram* (1) it was held that a minor member of a family, interested in an ancestral trade carried on on behalf of the family, is bound by the acts of the manager necessary with reference to the carrying on of the trade, but Sausse, C. J., in delivering judgment treated the rule as exceptional and not to be pushed beyond its strict limits. He observes, at p. LXXII :—"The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest, and the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection which the Hindu law generally extends to the interests of a minor should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case." See also *Johurra Bibee* v. *Sreegopal Misser* (2) and *Bemola Dossee* v. *Mohun Dossee* (3). Further than this the authorities do not go.

In the case of *Lutchmanen Chetty* v. *Siva Prokasa Modeliar* (4) Sale, J., in the course of his judgment repudiated the notion that a Hindu minor who by birth or inheritance becomes entitled to an interest in a joint family business becomes at the same time a member of the trading partnership which carries on the business. He says, at p. 354 :—"A trade like other personal property is descendible amongst Hindus, but it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business becomes at the same time a member of the trading partnership which carries on the business. He can only become a member of the partnership by a consentient act on the part of himself and his partners, and it was on this ground held by the late Supreme Court that an infant of tender years,

(1) (1861) 1 Bom., H. C Rep., App. li.
(2) (1876) I. L. R., 1 Calc., 470.
(3) (1880) I. L. R., 5 Calc., 792.
(4) (1899) I. L. R., 26 Calc., 349.

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whose name was used in a partnership business, need not be joined as a co-plaintiff in a suit by the father to recover a trade debt—*Petum Doss* v. *Ramdhone Doss*, (1)."

In the case to which Mr. Justice Sale referred it was held that a child of tender years cannot be constituted nor can he hold himself out as a partner in a trading firm. Sir L. Peel, C. J., in his judgment in that case remarked that "a trading partnership is a consentient contract;" and later on:—"A trade may be directed to be carried on for the benefit of infants, but without their consent they cannot be made partners. It seems to follow from this that if infants are not partners, if they are to become partners on attaining age they must take some active step in that behalf. Persons having dealings with and giving credit to a joint family trading firm where there are minor members of the joint family presumably rely on the credit of the joint family property. It is that property alone, so far as minors are concerned, which the acting partners can pledge and to which the creditor can have recourse. When a minor attains full age, there is no good reason why the security of a party having dealings with the firm should be enhanced by giving him in addition to the security of the joint family property the security of any separate property to which a minor member may on attaining majority become entitled, unless it be that by some consentient act on the part of the latter he has accepted the position of a partner and ratified the transactions out of which the obligation to the creditor arose. Subramania Ayyar, J., aptly puts the matter thus in refusing to give a personal decree against certain members of a joint family to the creditors of a family partnership for a debt incurred by the managing members of the joint family, that is, a decree which should bind not merely the family estate but be enforceable also against the self-acquired or separate property of a son and nephews of one of the contracting parties. "No doubt," he observes, "where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other co-parceners are actual contracting parties, either because they had agreed before the contract was entered into to be personally

(1) (1848) Taylor, 270.

bound thereby or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably every such co-parcener is absolutely responsible. Equally he would be responsible, though he did not assent to the particular contract, if there had been such acquiescence on his part in the course of d[illegible] in which the particular contract was entered, as to war-[illegible]ated in the matter as a contracting party. When, hc[illegible]case, but the contract is of a character sub[illegible]manager to enter into inde-pendently [illegible]s of the family, so as to bind them [illegible]cope of the mana-ger's power is restricted [illegible]t beyond the fami-ly property. As regards the other [illegible] the hands of a co-parcener no other co-parcener, whether [illegible] the manager or not, has any title whatsoever. The legal individuality of a co-parcener is not merged in the manager so far as the co-parcener's self-acquired or other separate property is concerned."—*Chalamayya* v. *Varadayya* (1).

This view commends itself to us. A joint ancestral family business under the Hindu law managed by the adult members of the family differs from an ordinary contractual partnership. In the case of the latter, each partner is a contracting party, all the partners holding themselves out as trading on the credit of their combined and separate funds. Whereas in the case of a joint family ancestral business there is no contract of partnership whatever between the members of the joint family. The family frequently contains amongst its members minors who acquired their interest in the business by birth. Indeed it may be safely assumed that in most of the existing Hindu joint family trading firms the parties now interested in them acquired their interest by birth and not by contract. Admittedly minor members are liable to the extent of their respective interests in the joint family property for the acts of the managers of the joint family business. But we do not think that their liability extends further. If any of the members of a joint family happen to have separate estates we know of no good reason why such separate estate

(1) (1898) I. L. R., 22 Mad., 167.

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should be held so liable. We do not think that the rule laid down in the case of *Goode* v. *Harrison* (1) that a minor on attaining majority must promptly notify his disaffirmance of a partnership if he is to avoid future liabilities can, bearing in mind the dissimilarity in the ways in which a contractual partnership and a Hindu joint ancestral family trading business originate, be applicable.

In conclusion, then our view is that the defendant appellant, never having held himself out as a partner and never having taken any part whatever in the transactions out of which the plaintiff's claim has arisen, even though he had attained majority at the time, is not liable to satisfy that claim out of his separate property, in other words, that he did not after he had attained full age by any consentient act become a partner in the joint ancestral family business and thereby render his separate estate liable to satisfy the obligations of the firm. We therefore allow the appeal, and set aside so much of the decree under appeal as renders the appellant Bishambhar Nath personally liable under it. In other respects the decree will stand. We give the appellant, his costs of this appeal.

Appeal decreed.

PRIVY COUNCIL.

P. C. 1906 *November* 13, 14 *December* 14.

CHANDRA KUNWAR (DEFENDANT) v. CHAUDHRI NARPAT SINGH AND OTHERS (PLAINTIFFS) AND CHANDRA KUNWAR (DEFENDANT) v. MAKUND SINGH (PLAINTIFF).

Two appeals consolidated.

[On appeal from the High Court, North-Western Provinces, at Allahabad.]

Burden of proof—Admission by party to suit, effect of as shifting burden of proof—Admission not causing estoppel—Presumption as to admission by party—Right to rebut presumption—Question tried without specific issue—Remand—Civil Procedure Code (Act XIV of 1882), *sections* 55, 562, 566.

In a suit for property to which the plaintiff alleged he was entitled by inheritance from his natural father the defence was that he had been adopted into another family and therefore was no longer his natural father's heir, and this contention was supported mainly by the plaintiff's admissions made in deeds and other documents signed by him, to none of which, however, the defendant was a party.

Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1821) 24 R. R., 307.

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Held by the Judicial Committee that although the *onus* was on the defendant to prove the adoption the proof of the admissions shifted the *onus* on to the plaintiff on the principle stated in *Slatterie* v. *Pooley* (1) "that what a party himself admits to be true may reasonably be presumed to be so," and until the presumption was rebutted the fact admitted must be taken to be established.

Held also that where, as in the present case, there was no estoppel, the defendant being no party to the deeds, the plaintiff could give evidence to rebut such presumption.

Heane v *Rogers* (2); *Newton* v *Liddiard* (3); *In re Simpson* (4) and *Trinidad Asphalte Company* v. *Coryat* (5) followed.

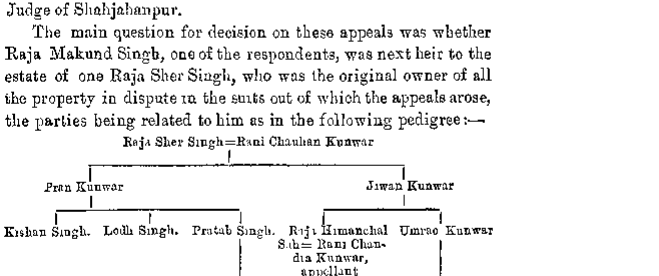
In this case their Lordships held that the plaintiff, so far from rebutting the presumption, had, in order to account for the admission made in the documentary evidence, put forward two different and inconsistent explanations, one of which was absurd and the other in its most important parts unproven, and had failed to prove his title

Where no specific issue had been framed on the question of adoption, but the matter had been tried and determined without any objection on the part of the plaintiff, who had not been taken by surprise, but was fully informed by the defendant's lists of documents and from the cross-examination of his witnesses that the defence would be taken

Held that under the circumstances it was undesirable that the case should be sent back to be re-tried on a special issue framed as to the adoption

Two consolidated appeals from two decrees (March 17th 1903) of the High Court at Allahabad, which reversed two decrees (December 12th, 1900) of the Court of the Subordinate Judge of Shahjahanpur.

The main question for decision on these appeals was whether Raja Makund Singh, one of the respondents, was next heir to the estate of one Raja Sher Singh, who was the original owner of all the property in dispute in the suits out of which the appeals arose, the parties being related to him as in the following pedigree:—



(1) (1840) 6 M. & W., 664, at p. 669. (3) (1848) 12 Q. B., 926
(2) (1829) 9 B. & C., 577, at p. 586 (4) (1876) L. R., 2 Ch. D., 72, at p. 89.
(5) (1896) L. R., A. C., 587.

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The respondents alleged that on Sher Singh's death his widow Rani Chauhan Kunwar succeeded to a Hindu widow's estate of inheritance. The appellant asserted that Raja Sher Singh made a gift of the property during his lifetime to his wife; that in 1854 and 1860 Rani Chauhan Kunwar made a gift of the property to her daughter Jiwan Kunwar who in 1863 transferred it to her son Raja Himanchal Sah, on whose death intestate he was succeeded by his widow Ram Chandra Kunwar the appellant. Jiwan Kunwar died on 25th September 1887 her son having predeceased her.

Raja Makund Singh on 16th September 1899 sold part of the property to the respondents Narpat Singh, Jamna Prasad, Gulzari Lal, and Asa Ram, and on 23rd September 1899 those respondents and Raja Makund Singh instituted these suits to eject the appellant from the whole of the property.

The plaints alleged that Rani Chauhan Kunwar succeeded to an estate for life in the property on the death of Raja Sher Singh; that on her death Jiwan Kunwar succeeded, as Pran Kunwar had died before Rani Chauhan Kunwar, and that the succession opened on the death of Jiwan Kunwar on 25th September 1887 to the next heir of Raja Sher Singh, who on that date was Partab Singh, who was the son of Pran Kunwar, and that on the death of Partab Singh, Raja Makund Singh succeeded as his son.

The defence in both suits was the same. The facts stated above as asserted by the appellant were set out; and it was denied that Partab Singh was the son of Pran Kunwar, and that Raja Makund Singh was the son of Partab Singh. It was also stated that Partab Singh's widow was alive, and this was admitted by the plaintiffs.

The only issue raised on the pleadings which is now material was the first. "Is Raja Partab Singh a son of Pran Kunwar; and is Raja Makund Singh a son of Raja Partab Singh?"

The two suits were heard together. The Subordinate Judge held that Raja Partab Singh was the son of Pran Kunwar (and that is now not in dispute), but that Raja Makund Singh was not the son of Raja Partab Singh because the evidence in the cases showed that he was the adopted son of Raja Kishan Singh. On

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this finding the next heir of Raja Partab Singh would be his widow, and the suits were consequently dismissed.

The respondents appealed to the High Court, and a Bench of that Court (SIR JOHN STANLEY, C.J. and BURKITT, J.) held that the question of adoption was not properly in issue, and upon the evidence that the adoption was not proved. They said:—

"The case was set up at the hearing of the arguments, that Raja Makund Singh had been adopted by his uncle Raja Kishan Singh. There was no allegation or suggestion of any such adoption in the written statement of the defendant, and no issue as to any such alleged adoption was framed, it was only after the evidence on both sides had closed that the question of adoption was mooted and discussed in the arguments of the pleaders for the parties. It is stated that the practice of closing the evidence on both sides, before any address or arguments of counsel or pleaders are heard, largely prevails in these Provinces, and that in this case this practice was observed. Three documents were adduced in evidence in which Raja Makund Singh was described as the adopted son of Raja Kishan Singh, and upon the evidence afforded by these documents, the main contention on the part of the defendant was based. It appears to us that if the defendant had had any intention of setting up this case of adoption it should have been directly raised in her written statement, and an issue knit upon it, and that in any case if the question was entertained by the Court an opportunity should have been afforded to the plaintiffs of meeting it. It cannot be said that the plea of the defendant that on the death of Raja Partab Singh his property devolved upon his widow according to Hindu Law suggested that he had had a son and that the latter had been adopted by his brother. This idea seems to have been suggested and developed by the defendant's vakil during the argument after the evidence had closed. This plea, if it was intended by it to raise the question of adoption, was most insidiously framed."

And, after considering the evidence on the other part of the issue they concluded:

"This evidence satisfies us beyond any reasonable doubt, and we find, that Raja Makund Singh was the natural son of Raja Partab Singh, and that he was never in the legal sense of the term adopted by his uncle Raja Kishan Singh. We also find that Raja Partab Singh was the son of Rani Pran Kunwar. We may add that the reflections cast by the learned Subordinate Judge upon the character of the plaintiffs' witnesses were in our opinion wholly undeserved. As we have pointed out, the evidence of a number of these witnesses was obtained by commission, and therefore we have had as good opportunity as had the learned Subordinate Judge of forming an estimate of its value and probative effect. As we have pointed out, there was no evidence worthy of the name to controvert it. We unhesitatingly therefore find that Raja Makund Singh is the son and heir of Raja Partab Singh. The question of adoption was never properly in issue between the parties, but, assuming

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that it was, we hold that the defendant has wholly failed to satisfy the onus which lay upon her of proving the adoption."

The High Court therefore reversed the decree of the Subordinate Judge, and remanded the case to him under section 562 of the Civil Procedure Code for trial of the other issues.

On this appeal,

DeGruyther for the appellant contended that there was sufficient evidence to prove that Raja Makund Singh was not the son of Raja Partab Singh so as to exclude the widow of Raja Partab Singh from succeeding. Though he was the natural son of Raja Partab Singh, yet the admissions in the documentary evidence proved that he had been taken in adoption by Raja Kishan Singh, which prevented his succession as an heir to Raja Partab Singh. The question as to the adoption was properly before the Court, although no special issue had been settled as to it: there was no surprise, and no objection had been taken by the respondents to the question being raised and determined. Under such circumstances the mere omission to settle an issue by the first Court did not necessitate the case being sent back for trial on an issue to be specially settled on the question of adoption. Reference was made to *Katchchalpama Rangappa Kulakka Tola Oodiar* v. *Kuchivijaya Rangappa Kulakka Tola Oodiar* (1) and *Mussumat Mitna* v. *Syud Fuzl Rub* (2). The respondents were fully informed that the question of adoption was in issue from the documentary evidence produced by the appellant in the course of the hearing before the Subordinate Judge, and from the questions put by the appellant's pleader to the respondents' witnesses. Civil Procedure Code (Act XIV of 1882), sections 138 and 147 were referred to. The suit should have been dismissed by the High Court and the decree of the Subordinate Judge should not have been reversed, as Raja Makund Singh was not in law heir to the property in suit.

G. E. A. Ross for the respondents contended that the High Court had rightly held that Raja Makund Singh was the son of Raja Partab Singh. The question of the adoption had not been properly tried. As stated in the judgment of the High Court, if it was intended to make the question of the adoption an issue in

(1) (1869) 12 Moore's I. A., 495: 2 B. L. R., P. C., 72.

(2) (1870) 13 Moore's I. A., 573: 6 B. L. R., 148.

the suits, it should have been raised in the appellant's written statements. The question was not properly raised by the plea that on the death of Raja Partab Singh his property devolved upon his widow according to Hindu law, for there was no suggestion in that plea that he had had a son who had been adopted by his brother Raja Kishan Singh: Civil Procedure Code, section 117 was referred to. The suits should be remanded for the determination of the question of adoption on an issue specially framed for that purpose. Reference was made to sections 562 and 566 of the Civil Procedure Code.

DeGruyther was called on to reply only on the question whether there should be a remand.

1906, *December* 14*th*. The judgment of their Lordships was delivered by LORD ATKINSON:—

The two suits out of which these consolidated appeals arise were brought to recover from the appellant possession of certain zamindari property, consisting of villages and gardens situate in the district of Budaun.

In one of these suits (No. 129 of 1899) Raja Makund Singh was the sole plaintiff, while in the second (No. 128 of 1899), certain persons to whom it was alleged he had purported to sell and convey the property sought to be recovered in that suit were the plaintiffs, and Makund Singh was joined as a *pro formâ* defendant. The evidence was taken in the second of these suits, but as the questions arising in both suits were practically identical, they were tried together and the evidence taken in one was, by arrangement between the parties, treated as having been taken in both and used for the purposes of both.

The property in dispute formerly belonged to Raja Sher Singh, a Raja of the State of Jaipur, who died many years ago, and in the events which have happened came by descent to Raja Partab Singh, his grandson, who died on the 26th of July 1893, leaving his widow him surviving. She is still alive. Raja Partab Singh was the youngest of three brothers. Both his elder brothers predeceased him. The eldest, Kishan Singh, the survivor of the two, died in 1873. At that date Partab Singh was 48 years old. The plaintiff Makund Singh claimed to be the lawfully begotten son of Partab Singh, and to have inherited from his father the

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property sought to be recovered in the two actions. This was the sole title on which he relied. His age was disputed, the defendants asserting that he was 10 years old in 1873, and the plaintiffs that he was then 13 years of age. Several defences were filed in both suits, in which it was alleged (amongst other things) that Partab Singh was not the father of Makund Singh. Upon these pleadings certain issues were framed, with the first of which their Lordships have alone to deal, since it is that on which the decisions appealed from were alone rested. This first issue ran as follows:—

"Is Raja Partab Singh a son of Pran Kunwar, and is Raja Makund Singh a son of Raja Partab Singh?"

It was found, and is not now disputed, that Partab Singh was the son of Pran Kunwar, the eldest daughter of Raja Sher Singh. It is upon the second branch of the issue that the controversy in the case arises. The Judges of the High Court have found that Partab Singh was natural father of Makund Singh, and their Lordships see no reason to disturb their finding on that point. Under the Hindu law, however, a man who has been adopted ceases by virtue of that adoption to be regarded as the son of his natural father, and becomes for the purpose of inheritance or succession the son of his adoptive father. And accordingly in the course of the litigation in the Court of the Subordinate Judge the defendant at an early stage, without protest or objection on the part of the plaintiffs, made the case that Makund Singh had been adopted by Kishan Singh. Deeds under the hands of Makund Singh and his father Partab Singh containing express statements to that effect were given in evidence by the defendant. Questions directed more or less pointedly to the matter were addressed to the plaintiffs' witnesses. Evidence was given by and on behalf of Makund Singh to explain away the admissions contained in those instruments and to account, if possible, for the fact that on the death of Kishan Singh Makund Singh had been put forward as his successor. No suggestion was made on behalf of the plaintiffs that they were taken by surprise. No application was made that the pleadings should be amended, a new issue framed, or the hearing adjourned. In order that the plaintiffs should succeed in these cases it was essential that it should be found in their favour (1) that Makund

Singh was the natural son of Partab Singh, and (2) that he had not been adopted by Kishan Singh. From the passage in the judgment of the Subordinate Judge (at the foot of page 98 in the second Record of Proceedings) it is quite clear that he considered that both these questions were before him for decision. His words were—

"The plaintiffs must then produce unimpeachable evidence to prove their allegation that Raja Makund Singh is a son of Raja Partab Singh, and, if so, he had not ceased to be so by having been adopted by Raja Kishan Singh."

He does not appear, however, to have come to a definite decision on either of these points, but merely to have arrived at the conclusion that the evidence before him did not amount to satisfactory proof that Makund Singh was the natural son of Partab Singh. The Judges of the High Court, on the other hand, found, as has been already stated, that Makund Singh was the natural son of Partab Singh, and although they considered that "the question of adoption was never properly in issue between the parties," yet, on the assumption that it was, held—

"That the defendant had wholly failed to satisfy the onus which lay upon her of proving the adoption."

It is to be regretted that a definite issue was not framed upon this point, and the matter thus put beyond all controversy. But that course never seems to have been suggested at any stage of the proceedings by any of the persons concerned.

The suits were commenced on 23rd September 1899. On the 30th November 1899 and 1st December 1899 respectively the issues were framed. The cases came on for hearing on the 30th November 1900. The arguments were concluded on the 1st December 1900, and judgment was delivered and decrees pronounced by the Subordinate Judge on the 12th December. Evidence was taken by commission and the witnesses examined by interrogatories at Alwar on the 29th January 1900, at Agra on the 5th November 1900, and the plaintiff Makund Singh at Delhi on the 16th October 1900. Other witnesses were examined in the Court of the Subordinate Judge at the hearing.

On the 30th November 1899 there was filed in Court on behalf of the defendant a list of documents, one of which is described as a copy of a deed of gift dated the 25th of June 1892, duly executed by Partab Singh and Makund Singh, in

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which the latter is stated to be the adopted son of Raja Kishan Singh, *rais* of Patan, in the Sowai Jaipur State." And on the 14th of May 1900 a second list of documents was in like manner filed on behalf of the defendant. One of the documents in this second list is described as a copy of a power of attorney, dated the 10th of June 1891, duly executed by Partab Singh and Makund Singh, in which the latter is similarly described, and in the body of the deed specifically stated to be the Ruler of Patan. The object for which the first document was to be given in evidence was stated to be—

"To prove that Makund Singh is not the son of Partab Singh, and that he did not mention himself in this document to be the son of Partab Singh."

And the object for which the second deed was proposed to be given in evidence was in like manner stated to be—

"To show that Raja Makund Singh is the adopted son of Raja Kishan Singh, and that in this *mukhtarnama* (power of attorney) Raja Makund Singh has described himself as the adopted son of Kishan Singh."

There can be no ground therefore for the suggestion that the plaintiffs were not fully informed that this question of adoption would be raised, and that one, if not both, of these documents, would be relied upon to prove the admissions of Makund Singh upon this question of adoption contained in them. This indeed was the only purpose for which they could have been given in evidence in these suits. One witness examined on behalf of the plaintiffs, Gur Dhan Singhji, was, on the 29th of January 1900, pointedly cross-examined as to this deed of gift.

On the 16th of October 1900, many months afterwards, Makund Singh was himself examined by interrogatories. In the seventh interrogatory he is asked:—

"What relation do you bear to Raja Kishan Singh, and how did you receive his property?"

Answer:—

"Raja Kishan Singh was my *taya* (father's elder brother). On his death he left no descendant, and his property devolved on my father. As my father was an old man, he of his own accord installed me on the *gaddi* of the *riyasat*."

And on cross-examination he deposed:—

"Raja Kishan Singh died in '30 Sambat. The title of Raja held by him was received by me. This title has not been given by any one. It is an hereditary one. After (the death of) Raja Kishan Singh, I was installed on the *gaddi* with the consent of my father. Before this Jamna Lal, pleader, examined me by means of commission. I stated in that deposition that after

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the death of Kishan Singh I received his estate by right of inheritance, *i.e.*, it came to my family By this statement I meant that my father received it, and that I received it with his consent. I do not remember now whether I stated in that deposition that Raja Partab Singh installed me."

To the pleader for the plaintiff :—" I was not asked plainly whether that property was received by Partab Singh or by me "

On the 5th December 1900, after the arguments in the case had concluded and before judgment was delivered, the pleaders of the plaintiffs made an application to the Court of the Subordinate Judge that the reason given in the argument why Makund Singh described himself in the deed of gift and power of attorney as the adopted son of Kishan Singh should be reduced into writing and recorded, that reason being that—

"The Patan Raj was in the name of Raja Kishan Singh, that Raja Makund Singh was mentioned as his adopted son, so that he might be installed on the *raj gaddi*, and that at the time of installation, a *nazrana* (present) is paid to the Jaipur Raj as a token of mourning. After the death of Kishan Singh, Makund Singh was installed on the *gaddi* to make a saving in the payment of the *nazrana*; for once it would have to be paid at the time of installation of Raja Partab Singh after the death of Raja Kishan Singh, and again at the time of installation of Makund Singh after the death of Raja Partab Singh. As Makund Singh was proclaimed an adopted son at the time of installation, he was written as such in the documents"

This was accordingly done, but no proof whatever was given that the custom of giving *nazrana* on the occasion of installations to a *raj gaddi* prevailed in the State of Jaipur, or that a *nazrana* had, in fact, been paid on the occasion of Makund Singh's installation. Moreover, this explanation put forward at the last moment was not alluded to, directly or indirectly, by any of the witnesses examined in the case, and is quite inconsistent with the evidence of Makund Singh himself above set forth. It is, in addition, the second explanation, not the first, and is in direct conflict with that which preceded it. The first explanation is deposed to by more than one of the witnesses examined on behalf of the plaintiffs, but is set forth more fully in the evidence of Pandit Ram Kunwar, who was examined at Agra on the 5th November 1900, than in that of any others. In answer to the seventh interrogatory addressed to him, he deposed—

"Maharaja Partab Singh had a right of inheritance after the death of Raja Kishan Singh. But he subsequently thought that as he was advanced in years he might perhaps also die. This led him to give the whole of the property to Makund Singh. Makund Singh was the managing member of

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the families of Raja Kishan Singh and Partab Singh. There was no other managing member. It was for this reason that the property was given to him."

As at the date of Kishan Singh's death Partab Singh was only 18 years of age and Makund Singh at most 13 and possibly only 10 years of age, this explanation was not only incredible but absurd. It was therefore not unnaturally deemed advisable to suggest another. And accordingly the economical reason—the desire to escape a double tax, the giving of *nazrana* twice over—was at the last moment put forward in argument and subsequently solemnly recorded.

On the materials before their Lordships the broad and undisputed facts of these cases appear to be—

(1.) That the plaintiff Makund Singh more than once under his hand and seal stated that he was the adopted son of Kishan Singh, which statement was in effect an admission that he had no title to the lands he sought to recover in these actions.

(2.) That at the death of Kishan Singh Makund Singh was treated as the former's adopted son, and in that character, and by that right, installed in the *raj gadi*.

(3.) That according to the evidence of three at least of the plaintiffs' witnesses, on the death of Kishan Singh, Makund Singh entered into the possession and enjoyment of the former's property.

(4.) That two different and inconsistent explanations have been put forward by the plaintiffs to account for the admission contained in the deeds, as well as for the action taken by the parties concerned after the death of Kishan Singh, one of which explanations is absurd and the other, in its most important parts, unproven.

The learned Chief Justice in his judgment points out that the burden of proving that the adoption relied upon took place, rests on the defendant. That is undoubtedly so, but it is difficult to conceive how she could, as against Makund Singh—*primâ facie* at all events—discharge that burden more effectually than by proving his solemn statement under hand and seal that it did take place. The proof of this admission shifts the burden, because, as against the party making it, as Baron Parke says in *Slatterie* v. *Pooley* (1):—"What a party himself admits to be

(1) (1840) 6 M. & W., 664, at p. 669.

true may reasonably be presumed to be so." No doubt, in a case such as this, where the defendant is not a party to the deeds and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. The law upon the point is clear. In *Heane* v. *Rogers* (1), Bayley, J., in delivering the judgment of the Court lays it down that—

> "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound.

In *Newton* v. *Liddiard* (2), Lord Denman approved and adopted this statement of the law, and *Ex parte Morgan, In re Simpson* (3), and *Trinidad Asphalte Company* v. *Coryat* (4), in effect illustrate the same principle. There is here no suggestion of mistake. And the question for the decision of their Lordships in effect resolves itself into this:—Has Makund Singh proved satisfactorily that the admissions contained in the deeds to which he was a party are untrue in fact? In the opinion of their Lordships that question must be answered in the negative.

Their Lordships must therefore hold that on the materials before them the title of the plaintiffs to recover has been disproved.

Mr. *Ross*, on behalf of the plaintiffs, earnestly pressed that a specific issue on this question of adoption might now be framed, and submitted for trial to the Subordinate Judge. Their Lordships consider that, as matters now stand, this would be a most undesirable course, and they are unable to adopt it.

Their Lordships will therefore humbly advise His Majesty that the appeals should be allowed, the decrees of the High Court set aside with costs, and the decrees of the Subordinate Judge dismissing the actions restored.

The respondents must pay the costs of the appeals.

Appeals allowed.

(1) (1829) 9 B & C, 577, at p. 586.
(2) (1848) 12 Q. B, 925.
(3) (1876) L. R., 2 Ch. D., 72, at p. 89.
(4) L. R., (1896) A. C., 587.

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Solicitors for the appellant in both appeals:—*Ranken, Ford, Ford & Chester.*

Solicitors for the respondents in both appeals:—*Barrow, Rogers & Nevill.*

J. V. W.

P. C. 1906 *November* 14 *December* 14.

GAJRAJMATI TEORAIN AND OTHERS (PLAINTIFFS) v AKBAR HUSAIN AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Sale in execution of decree—Material irregularity in conduct of sale—No proof of substantial injury—Postponement of sale—Order staying sale withdrawn and sale held without issue of fresh proclamation—Civil Procedure Code (Act XIV of 1882), sections 290, 291, 244 and 311, 312

A proclamation of sale in execution of a decree fixed the sale for 20th February 1897. By an order of the Subordinate Judge of Gorakhpur, made *ex parte* on 11th February, the sale was stayed, and on 16th the Collector acting on that order, struck the proceedings off the pending file. On 22nd February, in consequence of notice received from the Subordinate Judge that the order staying the sale had been set aside, the sale was brought on in continuation of the sales listed for the 20th, which had not been finished, and on the 23rd the property of the judgment-debtors was sold to the decree-holder who had obtained leave to bid. On application for confirmation of the sale the judgment-debtors applied under section 311 of the Civil Procedure Code to have the sale set aside, but the Subordinate Judge confirmed the sale, finding that, although there were irregularities in the conduct of the sale, the judgment-debtors had not sustained any damage, and that decision was upheld by the High Court. In a suit to have the sale annulled on the grounds stated in the application under section 311, one of which was that the sale was illegal without the issue of a fresh proclamation of sale: *Held* by the Judicial Committee that the suit was not maintainable. Assuming that a fresh proclamation should have been issued, the omission was an irregularity which had involved no loss to the judgment-debtors, whose only course was to object, as they did, to the confirmation of the sale, which they could not afterwards impeach by regular suit.

APPEAL from a decree (January 31st, 1902) of the High Court at Allahabad, which reversed a decree (January 12th, 1899) of the Subordinate Judge of Gorakhpur and dismissed the appellants' suit with costs.

The main questions for determination on this appeal related to the validity of a sale in execution of decree held on 23rd February 1897, and to the right to maintain a suit to set aside

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Present.—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

the sale after proceedings by application under section 311 of the Code of Civil Procedure (Act XIV of 1882) had been unsuccessfully taken.

The decree in execution of which the sale in execution of 23rd February 1897 was held was made by the High Court at Allahabad on 13th May 1885 and modified on appeal a decree made on 7th July 1884 by the Subordinate Judge of Gorakhpur. The decree-holder was one Muhammad Kazim for himself and as heir of one Muhammad Hadi, deceased, and at the time when the suit out of which the present appeal arose, was brought, the interest of the decree-holder had become vested in the respondents Akbar Husain, Imtiaz Husain and Inayat Husain and also in Mutazai Bibi the widow of Muhammad Kazim, Sakina Bibi his sister, Jamna Bibi the widow of Muhammad Hadi, and Akbari Bibi his daughter.

The judgment-debtors were Gajrajmati Teorain and Achraj Nath Tewari, as heir of Anarkali and Dilbasi. Achraj Nath Tewari is now represented by the appellants other than Gajrajmati Teorain.

The decree was a mortgage decree and directed the sale of the immovable property hypothecated.

For some years the appellants successfully resisted execution of the decree by sale of the property. On the 18th September 1896, certain objections made by them were dismissed, amongst them being one that execution could not proceed until a certificate of succession to the estate of Muhammad Kazim had been obtained. Eventually an order was made for the sale of the property and a sale proclamation was issued on 21st December 1896 directing a sale by the Collector of Basti on 20th February 1897.

On 17th February 1897 the respondents Inayat Husain and Imdad Husain obtained permission to bid at the sale. Previously, however, an application had been made on 10th February 1897 on behalf of one Tripati Bishambhar Nath who was no party to the decree or execution proceedings for the postponement of the sale on the ground that he had instituted a suit to establish his right to the property proclaimed for sale, and on 11th February 1897 the Subordinate Judge ordered the sale to be stayed; but Inayat Husain on 19th February 1897, on hearing of that order,

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applied to the Subordinate Judge to set it aside, and an order was made to that effect, but directing that the sale "will be only of the interest of the judgment-debtor in the property to be sold." The sale was therefore proceeded with, but there being other sales to be got through, the property was actually sold on 23rd February to Imdad Husain and Inayat Husain for Rs. 22,000.

The judgment-debtors then made an application to the Court of the Subordinate Judge of Gorakhpur, under section 311 of the Code of Civil Procedure to set aside the sale.

The main objections then made by the decree-holders were that the application was not governed by section 311; that the circumstances under which the order postponing the sale was given and withdrawn constituted an irregularity; that the postponement of the sale prevented intending purchasers from appearing; that the notification of sale contained no specification of the particulars required by section 287 of the Civil Procedure Code; that a fresh notification ought to have been issued for the sale of 23rd February 1897, and that the judgment-debtors had sustained substantial injury by the irregularities in the sale proceedings.

On 22nd May 1897 the Subordinate Judge dismissed the application, holding that it properly fell under section 311 of the Code; that the proceedings taken were regular; and that the sale could not be set aside, as the property had been sold for full value and no substantial injury had resulted to the judgment-debtors. And he made an order confirming the sale.

Against the order dismissing the application the judgment-debtors appealed to the High Court, and that Court in February 1898 dismissed the appeal, on the ground that, although some of the proceedings were irregular, yet as no injury had been sustained by the judgment-debtors the sale could not be set aside.

The judgment-debtors on 5th May 1898 brought the present suit to set aside the sale, asserting that it "was incapable of enforcement." The defence was that the suit was not maintainable.

Of the ten issues settled, only two were now material—(4) whether the application for execution, and the sale held in pursuance of it were according to law? and (5) whether the order for sale was made according to law?

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The Subordinate Judge held that the irregularities complained of were not irregularities in publishing or conducting the sale, and therefore the proper remedy was by suit and not by application under section 311 of the Code; and that the sale was bad in law because no fresh proclamation of sale was issued after the order of postponement of 11th February 1897; and he made a decree in favour of the plaintiff that the decree should be set aside.

On appeal the High Court (SIR JOHN STANLEY, C.J., and BURKITT, J.) held that the questions raised in the suit were questions which had been properly raised under section 311 of the Code on the application made under that section; and the dismissal of that application was, under section 312 a bar to the present suit. The material part of their judgment was as follows:—

"The reply to the suit made by the defendants is that the suit as framed is not maintainable. It appears that when the sale took place in February 1897, an application was made to the court executing the decree under section 311 of the Code complaining of various matters, and amongst other matters alleging first of all that the sale proclamation had not been properly made and also that the sale took place on the 23rd February 1897 without the issue of a new proclamation. The reason for the sale taking place in the way mentioned is that the judgment-debtor by an *ex parte* application made in another suit obtained from the Court hearing that suit an injunction restraining this sale.

"That order was passed on the 11th February 1897. On the 19th of the same month the decree-holder applied to the Court, alleging that the judgment-debtor had obtained that order by fraudulent misrepresentations and the order was thereupon discharged.

"There was nothing then to prevent the sale taking place as already ordered, but from press of work in the Collector's office the sale did not take place till the 23rd of February. On the application mentioned above under section 311, the Subordinate Judge overruled all the objections made to the sale and confirmed it. On appeal to this Court it was held that the decision of the Subordinate Judge was right. This Court held that though there may have been some irregularities, yet as it clearly appeared that the judgment-debtor had at the auction-sale obtained a higher price than the property probably was worth he had suffered no substantial loss and that the application was therefore properly rejected. The judgment-debtor having thus failed by applications has now instituted this suit in which he reiterates one or two of the objections taken in his application under section 311 and adds to them some further grounds for having the sale set aside. He sets forth six grounds for this suit. The first of these was that the sale had been postponed on the 11th February and that afterwards it took place without issue of a fresh proclamation. That question was fully disposed of in the appellate order of this Court in the appeal mentioned above and is a matter concerning the publishing

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or conducting the sale within the meaning of section 311. . . . . The Court executing a decree has no right or authority to inquire whether that decree was properly passed or not All that it has got to do is to execute it, and moreover we may add that this question was disposed of on another occasion by a predecessor of this learned Subordinate Judge. For the above reasons we are of opinion that every one of the grounds raised to substantiate the suit are questions which should have been raised on an application under section 311, and under the proviso to section 312 no regular suit will lie under such circumstances. The proper procedure is by application—a remedy which the judgment-debtors had already exhausted."

THE High Court therefore allowed the appeal, reversing the decree of the Subordinate Judge, and dismissed the suit.

On this appeal,

H. Cowell for the appellants contended that the sale was void on the ground that a fresh proclamation should have been published before the sale could legally take place on 23rd February 1897. The sale was fixed for 20th February, but was stayed by the order of 11th February and that order operated as an adjournment *sine die* of the sale as fixed by the original proclamation. When the order staying the sale, therefore, was withdrawn, there was no day fixed for the sale to take place, and a fresh proclamation was necessary under section 291 of the Code of Civil Procedure before any sale could be legally held; and it could not under section 290 be held before 30 days after the proclamation. The omission to issue a fresh proclamation, and holding the sale without one, were not merely irregularities but illegalities which entitled the judgment-debtor to have the sale set aside without showing that substantial injury had resulted. Reference was made to *Bakhshi Nand Kishore* v. *Malak Chand* (1); *Ganga Prasad* v. *Jag Lal Rai* (2) and Civil Procedure Code (Act XIV of 1882), sections 286, 287, 290, 291.

DeGruyther for the respondent Inayat Husain contended that the suit was barred by sections 244 and 312 of the Civil Procedure Code. The matter of the suit was one which should have been decided in execution of decree; and a suit could not by the express terms of section 312 be brought after an application under section 311 had been refused on the same grounds. Although non-compliance with the provisions of section 290 is a material irregularity within section 311, its effect is not to nullify the

(1) (1885) I. L. R., 7 All., 259. (2) (1889) I. L. R., 11 All., 883.

sale unless substantial injury is proved; *Tasadduk Rasul Khan* v. *Ahmad Husain* (1). Here no substantial injury has resulted.

Cowell replied. The case was not within section 244 of the Code.

1906, *December 14th.*—The judgment of their Lordships was delivered by LORD MACNAGHTEN :—

This is an appeal from a decree of the High Court at Allahabad, reversing the decree of the Subordinate Judge, and dismissing, with costs, a regular suit brought for the purpose of annulling a sale in execution proceedings.

The sale was held under a decree of the Subordinate Judge of Gorakhpur by the Collector of Basti. The sale proclamation was duly issued. The sale was fixed for the 20th of February 1897. It was held on the 23rd, but before the Collector had finished the sales listed for the 20th.

It appears that an order was made *ex parte* on the 11th of February 1897 by the Subordinate Judge of Gorakhpur staying the sale. On the 16th of February the Collector of Basti, in obedience to this order, struck the proceedings off the pending file. However, on the 22nd, in consequence of notice received from the Court of the Subordinate Judge, from which it appeared that the order staying the sale had been set aside, the case was then brought forward, as the Collector notes, "in continuation of the sale proceedings in other cases." The sale was commenced, but adjourned till the following day. On the 23rd the decree-holders, who had leave to bid, purchased at the auction the interest of the judgment-debtors, and the sale was concluded in their favour subject to confirmation by the Civil Court.

On the application for confirmation the judgment-debtors applied to have the sale annulled. The Subordinate Judge confirmed the sale, finding that, although there were irregularities in the conduct of the sale, the judgment-debtors had not sustained any damage. On appeal the High Court at Allahabad confirmed the decision of the Subordinate Judge.

Then the judgment-debtors brought this suit.

The order committing the sale to the Collector of Basti is not in evidence, nor does it appear clearly in what capacity the Collector

(1) (1893) L. R., 20 I. A., 176

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sold, or on what grounds the order staying the sale was made, or on what grounds it was revoked, or whether any notice was ever given to the public that the sale had been stayed, and that the case was for a time struck off the pending file. It appears, however, to have been assumed in the present litigation, and their Lordships assume for the purpose of their judgment, that the case came within section 291 of the Code of Civil Procedure, and that when the stay of proceedings was removed, a fresh proclamation ought to have been issued in compliance with the terms of that section.

The Subordinate Judge held that, inasmuch as no fresh proclamation was issued, the sale was void, and therefore he pronounced a decree in favour of the judgment-debtors.

The Court of appeal, assuming that a fresh proclamation ought to have been issued, held that the omission was an irregularity which had involved no loss to the debtor; that the only course open to the judgment-debtors was to object, as they did, to the confirmation of the sale, and that it was not competent for them to impeach the sale by regular suit.

Their Lordships are of opinion that the decision of the High Court is perfectly right. The provisions of the Code of Civil Procedure are, in their opinion, clear on the point.

Their Lordships will, therefore, humbly advise his Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers, and Nevill.*

Solicitors for the respondent, Syed Inayat Husain :—*Ranken, Ford, Ford and Chester.*

J. V. W.

APPELLATE CIVIL.

1906
November 7.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

KISHAN KUNWAR (DEFENDANT) *v.* FATEH CHAND AND OTHERS (PLAINTIFFS).*

Land-holder and tenant—Rights of zamindars in respect of house-sites and grove-lands —Wajib-ul-arz—Construction of document.

The plaintiffs purchased six plots of land consisting partly of groves and partly of land formerly the sites of houses, but since brought under cultivation, and, failing to get their names recorded as absolute owners of the plots, brought a suit virtually for a declaration of their proprietary title.

It was shown in evidence that the inhabitants of the village in which the plots in suit were situated were in the habit of selling and transferring their houses. The wajib-ul-arz set forth that the occupiers of houses had this power, but although the entries the zamindar was recognized, and it was stated that if a new house was to be built the permission of the zamindar must be obtained. The entry in the wajib-ul-arz as to groves was to the effect that isolated trees and clumps of bamboos planted by tenants might be cut by them; as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar must be obtained.

Held that the inference of law deducible from the facts stated above was that the plaintiffs were not the absolute owners of the plots purchased by them.

THE facts of this case are as follows:—

The plaintiffs purchased six plots of land in a village called Rampur. The plots consisted partly of groves and partly of plots of land which had once been the sites of houses, but had, since the demolition of the houses, been brought under cultivation. The plots so purchased were situated in a mahal the sole zamindar of which was one Kishan Kunwar. After their purchase the plaintiffs applied in the Revenue Court to be recorded as absolute owners and proprietors of these plots. Their application was refused. They then instituted the present suit, which was in effect a suit for a declaration of their title as against the defendant zamindar. The Court of first instance (Munsif of Etah) dismissed the suit; but on appeal by the plaintiffs the lower appellate Court (Subordinate Judge of Aligarh) reversed the Munsif's decision and decreed the plaintiffs' claim. The defendant thereupon appealed to the High Court.

* Second Appeal No. 1235 of 1904, from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 25th of July 1904, reversing a decree of Munshi Chhajju Mal, Munsif of Etah, dated the 22nd of September 1903.

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The Hon'ble Pandit *Sundar Lal*, The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Gokul Prasad*, for the appellant.

Mr. *B. E. O'Conor*, Maulvi *Ghulam Mujtaba* and Dr. *Satish Chandra Banerji*, for the respondents.

KNOX and RICHARDS, JJ.—The facts of the suit out of which this appeal arises are undisputed. The plaintiffs purchased six plots of land consisting partly of groves and partly of plots of land which were formerly the sites of houses in Rampur but which have since been brought into cultivation after demolition of the houses standing thereon. The defendant is entered in the revenue papers as the zamindar of the entire mahal in which the plots so purchased are situate. After the purchase, the plaintiffs applied to the Deputy Collector to be entered as the absolute owners and proprietors of the plots so purchased. They were opposed by the defendant as zamindar and the application was refused. The plaintiffs then instituted the present suit to cancel the order of the Deputy Collector refusing to enter the names of the plaintiffs as proprietors. Apart from the question of form, the object of the suit is to obtain a declaration that the plaintiffs are the absolute owners and proprietors of the purchased plots of land and to establish their title thereto against the defendant.

The Court of first instance dismissed the suit. The lower appellate Court allowed the appeal and decreed the plaintiffs' claim. From the judgment of the lower appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the wajib-ul-arz, which were given in evidence. The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses. The wajib-ul-arz sets forth that the occupiers of houses had this power, but all through the entries the zamindar is recognised, and it is stated that if a new house is to be built the permission of the zamindar must be obtained. The entry in the wajib-ul-arz as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent-free groves, if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of the zamindar

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must be obtained. The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute), is that the groves and the land which had been the sites of houses were the absolute property of the persons who occupied and used them. In our judgment this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong. It was argued that the finding was a finding of fact and that this Court in a second appeal could not interfere. The learned vakil for the appellant stated that he had been through the record and was prepared, if necessary, to give a certificate that there was no evidence to support the finding of the lower appellate Court. We, however, think that on the existing grounds of appeal it is open to us to set aside the decision of the Court below. There is no dispute about the facts of the case or any finding of fact arrived at by the learned Subordinate Judge. The decision is based entirely upon a totally erroneous inference of law drawn from facts and evidence about which there is no dispute. We allow the appeal, set aside the judgment of the lower appellate Court, and restore the judgment of the Court of first instance with costs in all Courts.

Appeal decreed.

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November 21.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

LALMAN (PLAINTIFF) *v.* MOHAR SINGH AND OTHERS (DEFENDANTS) *

Act No IV of 1882 *(Transfer of Property Act), section* 88—*Mortgage—Charge—Suit for sale of property subject to a charge.*

There is no objection to the sale, in execution of a decree for sale on a mortgage, "subject to the charge" of property which is liable to a charge for maintenance in favour of a particular person. *Mata Din Kasodhan v. Kazim Hussain* (1) distinguished.

THIS was a suit for sale based upon a mortgage executed on the 19th August 1896 by one Mohar as managing member of a joint Hindu family. The plaintiff admitted in his plaint that the property mortgaged was, along with other property, subject to a charge for the payment of Rs. 40 per mensem to a widow, Musammat Gulabi, and he sought to have the property sold subject to

*First Appeal No. 245 of 1904 from a decree of S. P. O'Donnell, Esq., Subordinate Judge, Dehra Dun, of the 31st of May 1904

(1) (1891) I. L. R., 13 All., 432.

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the charge in favour of Gulabi, or else that provision should be made to secure Musammat Gulabi's rights. The Court of first instance (Subordinate Judge of Dehra Dun) treated the plaintiff as in the position of a subsequent mortgagee, and held that, without redeeming "the mortgage" of Musammat Gulabi, no decree for sale of the mortgaged property could be made. The Court therefore made a decree in respect only of a small portion of the mortgaged property which was not subject to a charge in favour of Musammat Gulabi. The plaintiff thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff appellant for sale of mortgaged property. It is admitted in the plaint that the mortgaged property with other property is liable to a charge for maintenance in favour of Musammat Gulabi, namely, to the payment to her of Rs. 40 per mensem. The learned Subordinate Judge dismissed the greater part of the claim on the ground that the property comprised in the mortgage, which was subject to the charge for maintenance, could not be sold in view of the decision of this Court in the case of *Mata Din Kasodhan* v. *Kazim Husain* (1). In his judgment the learned Judge treated the plaintiff as in the position of a subsequent mortgagee and held that, without redeeming what he described as the mortgage of Musammat Gulabi, the Court could not direct the sale of the property. It appears to us that he was quite in error in treating Musammat Gulabi as a mortgagee. She has only a charge upon the property for maintenance and is not a mortgagee, and the decision, therefore, in *Mata Din Kasodhan* v. *Kazim Husain* has no application. We therefore allow the appeal, and in lieu of the decree passed by the learned Subordinate Judge, give a decree to the plaintiff for the amount of his claim. We extend the time for payment of the mortgage debt up to the 22nd of May next. In default of payment we give a decree for sale of the mortgaged property, the sale to be made subject to the charge for maintenance of musammat Gulabi. We direct that the decree be drawn up in the

(1) (1891) I. L. R., 13 All., 432.

form prescribed by section 88 of the Transfer of Property Act. In other respects the decree will stand. The plaintiff appellant will have the costs of this appeal as against the mortgagors, the same to be added to the mortgage debt.

Appeal decreed.

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1906 *November* 27.

Before Mr. Justice Sir George Knox and Mr. Justice Richards

KASTURA KUNWAR (OBJECTOR) v. GAYA PRASAD AND ANOTHER (OPPOSITE PARTIES) *

Civil Procedure Code, sections 244 and 318—Execution of decree—Procedure—Appeal—Dispute between two judgment-debtors as to right to property sold in execution

In execution of a decree against *K* and *J* certain property of the judgment-debtors was sold, and was purchased by *G P* and this sale was confirmed. *G P* then applied under section 318 of the Code of Civil Procedure asking that *J* might be substituted for the applicant and possession given to her. To this application *K* objected, on the ground that she, at some time prior to the execution of the decree and sale of the property, had given a certain sum of money to *J*, and that *J* had misappropriated this money and had purchased with it the property which was sold in execution of the decree. *Held* that no question was raised falling within the purview of section 244 of the Code of Civil Procedure and no appeal would lie from the order allowing the auction purchaser's application under section 318.

In this case in execution of a decree held by one Sheo Prasad Singh against Musammat Kastura Kunwar and Musammat Jaleba Kunwar the decree-holder caused certain property to be sold. The property so sold was purchased by one Gaya Prasad. The money was duly paid and admittedly reached the right hands. The sale was confirmed, and a sale certificate issued in favour of Gaya Prasad. Gaya Prasad then made an application under section 318 of the Code of Civil Procedure asking that the name of Jaleba Kunwar might be substituted in the sale certificate for his own and possession delivered to her. To this application Kastura Kunwar objected, alleging that at some time prior to the execution of the decree and sale of the property she had given a certain sum of money to Jaleba Kunwar and that Jaleba Kunwar had misappropriated that money and with it had purchased the property which was sold in execution of the decree. The Court (District Judge of Ghazipur) disallowed Kastura Kunwar's objections and directed that Jaleba Kunwar should be

* First Appeal No 101 of 1906, from a decree of Pandit Sri Lal, District Judge of Ghazipur, dated the 30th of March 1906.

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put into possession of the property sold, as asked by the certified purchaser Gaya Prasad. From this order Kastura Kunwar appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

RICHARDS, J.—The facts out of which this appeal arises are shortly as follows:—One Sheo Prasad Singh obtained what was admittedly equivalent to a decree against Musammat Kastura Kunwar and Musammat Jaleba Kunwar. In execution of that decree certain property of the judgment-debtors was taken in execution and sold, one Gaya Prasad being the auction purchaser. The money was duly paid and has admittedly reached the right hands. The sale was duly confirmed and a sale certificate granted Gaya Prasad then made an application (which has led to this appeal) under section 318 of the Code of Civil Procedure. Musammat Kastura Kunwar objected to an order being made for the delivery of possession on this application. We may mention here that Gaya Prasad in his application for delivery of possession asked that Musammat Jaleba should be substituted for him and possession given to her. The grounds of objection sought to be put forward by Musammat Kastura were that she, at some time prior to the execution of the decree and sale of the property, had given a certain sum of money to Musammat Jaleba, and that Musammat Jaleba had misappropriated this money and had purchased with it the property which was sold in execution of the decree. It is admitted here that the decree was properly obtained, that the property was properly attached and sold, and that the sale cannot and ought not to be set aside. Under these circumstances it is extremely difficult to see how the question of misappropriation of a sum of money by Musammat Jaleba relates in any way to the execution, discharge or satisfaction of the decree. If the Court executing entertained and heard the objection put forward by Musammat Kastura and found her allegations proved, it could not possibly adjust matters between the parties save by giving a personal decree to Musammat Kastura against Musammat Jaleba. This the Court executing the decree clearly could not do. A great number of cases have been cited by Mr. *Agarwala* in the course of his careful and able argument and

he has urged that it is not necessary to have any person representing the plaintiff, and that if disputes arise between judgment-debtors or their representatives and if the matter relates to the execution, discharge or satisfaction of the decree, the matter is one under section 244 of the Code of Civil Procedure and ought to be decided by the Court executing the decree. The facts of this case are not identical with the facts of any of the cases that have been cited, and in my judgment there being no application by Musammat Kastura to set aside the sale or execution, the point raised by her does not relate to the execution, discharge or satisfaction of the decree or to the stay of execution thereof. I consider that the dispute between her and Musammat Jaleba can only be settled in an independent suit brought for that purpose. It must be admitted that unless the appeal can be brought under section 244, no appeal lies. I accordingly would dismiss the appeal.

KNOX, J.—I agree. I desire only to emphasize what has already been said that the facts of this particular case are peculiar and our decision relates to these facts only. The person who bid at the sale was one Dwarka Pathak. He, however, purchased for Gaya Prasad, and a sale certificate under section 316 of the Code of Civil Procedure was given in the name of Gaya Prasad. This was a matter of past history before the present applications, out of which the present appeal has arisen, were filed. It was Gaya Prasad who had therefore to apply, and who did apply, to be put in possession of the property which he had purchased. It is true that in his application he says that on the 23rd of June, 1905, he executed a deed of relinquishment in favour of Musammat Jaleba Kunwar, but the execution of this deed of relinquishment will not automatically make Jaleba Kunwar auction purchaser. Gaya Prasad is certified as auction purchaser and remains as auction purchaser until such proceedings may take place, if they can take place, as would bring Jaleba Kunwar on the record. She is on the record at present, but she is there by virtue of being judgment-debtor in the original proceedings and not by virtue of being an auction purchaser. The proceedings relating to the execution of the decree in the present case are between Gaya Prasad, auction purchaser, and Musammat

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Kastura Kunwar, who refuses to give possession. What Musammat Kastura Kunwar really desires is a declaration by the Court that the name of Gaya Prasad, the certified purchaser, has been inserted in the certificate fraudulently, and section 317 of the Code shows that a suit for such a declaration is recognised by law. There is an application by Musammat Jaleha Kunwar asking not to be brought on the record, but for delivery of possession in her favour. I have said enough to show that the circumstances of the present case are peculiar and in no way on all fours with any of the cases cited, and I agree that this case does not fall within the purview of section 244 *(c)* of the Code of Civil Procedure.

By THE COURT.—We dismiss the appeal with costs.

Appeal dismissed.

1906

December 5

Before Mr Justice Sir George Knox and Mr. Justice Richards.

BINDO (OPPOSITE PARTY) *v.* SHAM LAL (APPLICANT).*

Act No. VIII of 1890 (Guardians and Wards Act), section 10—Guardian and minor—Discretion of Court as to appointment of guardian.

In this case the High Court set aside the appointment of the father as guardian of his own daughter, aged 10 years, upon the grounds chiefly that the father had married again and that under the circumstances the child was likely to be happier with her maternal grandmother, with whom she had been living since the age of 5, than with her father.

THIS was an application by the father of a minor girl, aged 10 years, to be appointed her guardian. The girl had, according to the wishes of her mother, been living since the age of 5, that is to say, since the death of her mother, with her maternal grandmother, a Hindu lady in good circumstances. The application was opposed by the grandmother upon the grounds mainly that the father had married again, that he was not well off, and that the girl herself was happy with her grandmother and did not wish to go to her father. The District Judge, however, considered that the father's rights were paramount, and made an order appointing him guardian of the girl. Against this order Musammat Bindo, the grandmother, appealed to the High Court.

It may be noted that the father had made a previous attempt by means of a suit in the Munsif's Court to get possession of the

* First Appeal No 13 of 1906, from an order of D. R. Lyle, Esq., District Judge of Moradabad, dated the 22nd of December 1905.

girl but unsuccessfully; see I.L.R., 26 All., 594; s.c., Weekly Notes, 1904, p. 135.

Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Durga Charan Banerji*, for the respondent.

KNOX and RICHARDS, JJ.—This is an appeal from an order passed by the District Judge of Moradabad under the Guardians and Wards Act. The Judge has appointed the father as guardian of the person of a Hindu child and has directed that the minor, who is a girl nearly 10 years of age, be removed from the custody of her maternal grandmother and be made over to the custody of her father. It is an admitted fact that, until this order was passed the girl has been, since the death of her mother, for a period of five years continuously residing with and has been cared for by the maternal grandmother. There is no suggestion that the maternal grandmother is in any way unfit to continue to be a guardian of the ward. She is a Hindu lady in good circumstances, and it is obvious that if she had not cared for the child she would not have kept the minor so long under her charge. It is true that there is nothing against the father, but again it is an admitted fact that he has married a second time and the girl will have to go under the control of a step-mother, of whom probably she knows nothing. We cannot think that the girl, under these circumstances, will be so happy as she is in the house of the maternal grandmother. What we have to consider is what will really be for the welfare of the minor. Weighing all the circumstances we think that it will be more for the welfare of the minor to live with the maternal grandmother than with the step-mother. We accordingly decree the appeal, set aside the order of the Court below and direct that within one week from the time when our order reaches the Court below and is notified to the parties, the girl be restored by the respondent to the custody of the appellant. We make no order as to costs.

Appeal decreed.

1906
December 5

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

PURAN CHAND (PLAINTIFF) *v.* SHEODAT RAI (DEFENDANT).*

Suit to set aside decree on the ground of fraud—Sole question raised already disposed of in proceedings under section 108 of the Code of Civil Procedure.

In a suit to set aside a decree upon the ground of fraud, the sole fraud alleged was with respect to service of summons on the defendant. This question had already been gone into and decided by two Courts adversely to the defendant upon application made by him under section 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable. *Radha Raman Shaha* v. *Pran Nath Roy* (1) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (2) distinguished.

THE facts out of which this appeal arose are the following. Sheodat Rai obtained an *ex parte* decree against Puran Chand. Puran Chand applied under section 108 of the Code of Civil Procedure to have this decree set aside upon the ground of fraud in respect of the service of summons upon him; but this application was rejected and the order rejecting it was upheld on appeal. Puran Chand then brought a regular suit on substantially the same ground and on that ground only. The Court of first instance (Subordinate Judge of Benares) dismissed the suit upon the ground that the only question of fraud alleged had already been decided against the plaintiff, and this decision was upheld on appeal by the District Judge. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Madan Mohan Malaviya*, Maulvi *Muhammad Ishaq* and Munshi *Kalindi Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandra Mukerji*, for the respondent.

KNOX and RICHARDS, JJ.—We have heard all that the learned vakil who appears for the appellant could say on behalf of his client, and we find ourselves in accord with what was laid down by the Subordinate Judge. We were referred to the case of *Radha Raman Shaha* v. *Pran Nath Roy* (1) and also to the case of *Khagendra Nath Mahata* v. *Pran Nath Roy* (2), but in our opinion the facts of this case are, as the learned Judge

*Second Appeal No. 988 of 1905, from a decree of G. A. Peterson, Esq., District Judge of Benares, dated the 10th of August 1905, confirming a decree of Rai Mata Prasad, Subordinate Judge of Benares, dated the 23rd of June 1905.

(1) (1901) I. L. R., 28 Calc., 475. (2) (1902) I. L. R., 29 Calc., 395.

also points out, distinct from the facts of those cases. In the Calcutta cases there were specific allegations that the decree had been obtained by fraud and the execution proceedings which followed were similarly tainted with fraud. In the case out of which this appeal has arisen the only real fraud alleged is connected with the non-service of summons. This has already been fully gone into and decided against the appellant in the application which he filed under section 108 of the Code of Civil Procedure. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1906 *December* 6.

CHHITAR MAL (PLAINTIFF) *v.* JAGAN NATH PRASAD AND ANOTHER (DEFENDANTS).*

Guardian and minor—Contract—Specific performance—Specific performance of contract not favourable to minor: refused.

The certificated guardian of a minor, finding that it was necessary that some of the minor's property should be sold, applied for permission to the District Judge, who sanctioned the sale for a price of Rs. 725. Subsequently the guardian discovered that this was an inadequate price, and having received an offer of Rs. 825 for the property, went again to the District Judge for sanction to the second contract, obtained sanction and sold the property for Rs. 825. *Held* that the former contract being to the detriment of the minor could not be specifically enforced.

THE facts out of which this appeal arose are as follows:—

One Musammat Misri, the certificated guardian of her minor son Sanwalia, found it necessary to sell certain property belonging to the minor. She got an offer of Rs. 725 from Chhitar Mal, and obtained the sanction of the District Judge for the sale of the property to Chhitar Mal at that price. It was afterwards found that this price was inadequate, and on another offer of Rs. 825 being made by one Jagan Nath Prasad, Musammat Misri again applied to the District Judge for sanction to sell to Jagan Nath. The property was offered to Chhitar Mal at Rs 825, but he refused to give so much, and the property with the sanction of the District Judge was sold to Jagan Nath. Chhitar Mal then

* Second Appeal No 992 of 1905, from a decree of Babu Khettar Mohan Ghose, Additional District Judge of Aligarh, dated the 29th of July 1905, confirming a decree of Babu Jagat Narayan, Munsif of Koil, dated the 5th of May 1905.

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brought a suit for specific performance of the agreement to sell to him. The Court of first instance (Munsif of Koil) dismissed the suit, and this decree was affirmed on appeal by the Additional District Judge of Aligarh. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* and Munshi *Gulzari Lal*, for the appellant.

Babu *Durga Charan Banerji*, Munshi *Lakhmi Narain* and Munshi *Girdhari Lal Agarwala*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is a suit by the plaintiff appellant for enforcement of an alleged contract of sale of property for the sum of Rs. 725 entered into between him and one Musammat Misri, mother and certificated guardian of Sanwalia. The facts are that it apparently became necessary to sell portion of the minor's property. The mother and certificated guardian would seem to have obtained an offer from the plaintiff appellant of Rs. 725 for the purchase of that property. She thereupon applied to the Judge, under the provisions of the Guardians and Wards Act of 1890, for permission to sell the property described in her application for the sum of Rs. 725. An order was passed by the Judge sanctioning the sale; but, strange to say, the name of the vendee does not appear in the Judge's order. Before many days had passed the Judge would seem to have received information that the property had been sold too cheaply, and that the defendant respondent, Jagan Nath Prasad, was willing to give Rs. 825 for it. The District Judge caused this offer to be communicated to the plaintiff and offered the property to him at Rs. 825. He, however, refused to purchase at that price. The Judge thereupon sanctioned the sale to the respondent Jagan Nath. A sale-deed was duly executed and registered and the purchase money paid. This suit has now been instituted by the plaintiff appellant Chhitar Mal for specific performance of the alleged agreement between him and the minor's certificated guardian to sell to him the property in suit for the sum of Rs. 725. Both the lower Courts have dismissed the claim.

In appeal the argument chiefly advanced by the learned advocate for the appellant was that there was no power in the Judge to cancel his order sanctioning the sale for Rs. 725 and to accept

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the respondent's offer at a higher figure. We do not think it necessary to go into the question as to whether or not the District Judge had power to act as he has done. It seems to us that the question does not arise. We think that the principle on which we should act in this case is the principle that a Court will never enforce specific performance against a minor when such enforcement is to his detriment. Here it is manifest, that, if the plaintiff appellant succeeds, the result will be the loss of at least a hundred rupees to the minor. We think that Courts in this country, as in England, will not allow a bargain made by an improvident guardian to be enforced against the interests of the minor, if it be shown to be a bargain made to the detriment of the minor. Here there can be no doubt whatever that by her bargain the mother did not obtain the full value of her son's property. Therefore for that short reason, without going into any other considerations, we think that this appeal fails and must be dismissed with costs. We order accordingly.

Appeal dismissed.

1906

December 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

SUNDAR LAL AND OTHERS (PLAINTIFFS) *v.* CHHITAR MAL AND OTHERS (DEFENDANTS) *

Hindu Law—Joint Hindu family—Redemption of mortgage—Suit by father dismissed—Subsequent suit by sons.

A joint Hindu family, consisting of father and sons, were co-mortgagors by way of usufructuary mortgage of joint family property. The father sued for redemption, but was unsuccessful. *Held* on suit by the sons claiming to redeem the whole mortgage, that the sons were not precluded by reason of the result of their father's suit from suing to redeem, but they could not obtain redemption of more than their own shares.

THE facts of this case will be found reported in I. L. R., 29 All., 1, also in the Weekly Notes for 1906, at p. 242.

Babu *Jogindro Nath Chaudhri*, Babu *Sarat Chandra Chaudhri* and Munshi *Kedar Nath*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the respondents.

* Second Appeal No 340 of 1905 from a decree of A. B. Bruce, Esq., District Judge of Agra, dated the 3rd of February 1905, confirming a decree of Babu Rajnath Prasad, Subordinate Judge of Agra, dated the 7th of July 1904.

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SUNDAR LAL v. CHUHAR MAL.

STANLEY, C.J., and KNOX, J.—This second appeal arises out of a suit for redemption which was brought by the plaintiffs appellants and a number of other parties who claim to be entitled to a share in a village named Alaula, comprising an area of 157·67 acres. The claim of the plaintiffs appellants was dismissed on the ground that it was barred by a decision in a suit brought by their father, the defendant Jhadda, in respect of the same cause of action. When the case came before us for hearing we pointed out that the decision of the suit in which Jhadda was the claimant did not operate as *res judicata* against his sons, the present appellants, and we therefore hold that the Courts below were in error as to this. We remanded several issues to the lower appellate Court for determination under section 566 of the Code of Civil Procedure. We have the finding upon these issues before us.

It has been found that, of the property of which possession was claimed in the suit, 17 $\frac{1}{2}$ biswansis formed the share of the appellants. It has been also established that the mortgage under which the defendants held the property was satisfied many years ago by perception of the rents and profits. Mr. *Kedar Nath* on behalf of the appellants has contended before us that the appellants, together with Jhadda, formed a joint Hindu family and that the appellants were therefore entitled, notwithstanding the decision against Jhadda in the previous suit, to redeem the entire of the share of the family in the joint family property. Mr. *Sundar Lal* on the other hand has pointed out authority for the proposition that when Jhadda sought to redeem the mortgaged property and failed in his attempt to do so, his share in the joint family property must be treated as necessarily excluded from the claim of the present appellants. We think that this latter contention is well founded, and that the appellants can only now obtain possession of their share of the joint family property and not the share also of their father Jhadda. This being so, the appellants will be declared entitled to possession of 17 $\frac{1}{2}$ biswansis, that is, 21$\frac{3}{4}$ out of 60 shares of 157·67 acres. They will also be entitled to their proportionate part of the sum found to be due in respect of profits up to the year 1309 Fasli and to a further sum in respect of their proportionate share of profits up to the time when possession shall

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be handed over to them—these sums to be ascertained in the execution department. We accordingly allow the appeal to this extent and modify the decree of the lower appellate Court accordingly. The parties will have their costs in all Courts proportionate to failure and success.

Two objections were filed which have not been pressed. We say nothing as to the costs of these objections.

Decree modified.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1906 *December* 14.

PADAM LAL (PLAINTIFF) *v.* TEK SINGH AND ANOTHER (DEFENDANTS).*

Hindu law—Mitakshara—Will—Construction of document—Property devised to wife as "malik"—Estate taken by widow.

Where a Hindu governed by the Mitakshara Law devised immovable property to his wife stating that she would be the "malik" of the property after his death, it was *held* that the word "malik" imported an absolute proprietary interest, and that, in the absence of any indication of a contrary intention on the part of the testator, the widow took an absolute, and not merely a life estate in the property so devised. *Suraymani* v. *Rabi Nath* (1) dissented from. *Jamna Das* v. *Ramautar Pande* (2) distinguished. *Lala Ramjawan Lal* v. *Dal Koer* (3), *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4) and *Raj Narain Bhadury* v. *Ashutosh Chuckerbutty* (5) followed.

The facts out of which this appeal arose were as follows:—

One Gayendra Narain died possessed of the entire 16 annas of a village named Muhana, and leaving him surviving his second wife Musammat Kadam Kunwar and two daughters by her, Janki Kunwar and Rukmin Kunwar, and a daughter Tulsha Kunwar by his first wife. By his will dated the 31st of July 1866 Gayendra Narain declared that out of the 16 anna zamindari in the village Muhana "Musammat Kadam Kunwar will be the malik of a 10 anna 8 pie share" and Musammat Tulsha Kunwar his daughter of a 5 anna 4 pie share. He then stated that he had caused each of these ladies to be placed in separate possession of her share and that mutation of names might be effected in the revenue department under the will. On the death of

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* First Appeal No 278 of 1904, from a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 15th of August 1904.

(1) (1903) I. L. R., 25 All., 351 (3) (1897) I. L. R., 24 Calc., 406.
(2) (1904) I. L. R., 27 All., 364. (4) (1897) I. L. R., 24 Calc., 821.
(5) (1893—1900) I. L. R., 27 Calc., 44 and 649.

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the testator the devisees entered into possession of the property left to them; and in 1886 Kadam Kunwar caused the names of her two daughters to be recorded in respect of a 6 anna 8 pie share out of the 10 annas 4 pies devised to her, retaining the remaining 4 annas for herself. In 1888 Kadam Kunwar mortgaged this 4 anna share to Kunwar Tek Singh. The mortgagee brought a suit for sale on this mortgage and obtained a decree on the 30th of January 1901. Kadam Kunwar died in 1902, and thereupon (Janki Kunwar having died some years previously) the name of Rukmin Kunwar was substituted in the execution department in place of that of the original judgment-debtor Kadam Kunwar. The plaintiff Padam Lal then brought the present suit for a declaration that Kadam Kunwar was not competent to mortgage the property beyond the period of her own life, and there was no legal necessity for the mortgage. Padam Lal was the son of Rukmin Kunwar and the next reversioner. The Court of first instance (Subordinate Judge of Cawnpore) dismissed the suit, finding that under the will of her husband Kadam Kunwar became absolute owner of the share mortgaged; it also found that there was legal necessity for the mortgage. Against this decree the plaintiff appealed to the High Court.

Maulvi *Karamat Husain* and Mr. *A. E. Ryves*, for the appellant.

Dr. *Satish Chandra Banerji* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff Padam Lal to obtain a declaration that a 4 anna share in the village of Muhana in the district of Cawnpore is not saleable in execution of a decree obtained by the defendant Kunwar Tek Singh against the defendant Musammat Rukmin Kunwar. The entire village of Muhana belonged to the late Gayendra Narain, husband of Kadam Kunwar. He left his second wife Musammat Kadam Kunwar and two daughters by her, namely, Musammat Janki Kunwar and Musammat Rukmin Kunwar, and also a daughter, Musammat Tulshi Kunwar, by his first wife him surviving. The plaintiff Padam Kunwar is son of Rukmin Kunwar. Gayendra Narain before his death, namely, on the 31st of July 1866, executed a will

by which he purported to dispose of the village of Muhana. In the will he recites his title to the village in question and states that he has two heirs to that village, one his wife and the other his daughter: and then he declares that out of the 16 anna zamindari in that village "Musammat Kadam Kunwar will be the malik of a 10 anna 8 pie share," and Musammat Tulshi Kunwar his daughter of a 5 anna 4 pie share. Then follows a statement that he had caused each of these ladies to be placed in separate possession of her respective share and that mutation of names may be effected in the revenue department under the document so that there may be no dispute after his death. This is the substance of the will. No provision is made in it for Musammat Janki Kunwar. Shortly after its execution Gayendra Narain died and his widow and daughter Tulshi entered into possession of the shares given to them by his will. In April 1886 Kadam Kunwar had mutation of names effected in favour of her two daughters, Janki Kunwar and Rukmin Kunwar, in respect of a 6 anna 8 pie share out of her 10 anna 8 pie share. Of the remaining 4 anna share she herself remained in possession. On the 27th of August 1888 she executed a mortgage of this 4 anna share in favour of the defendant Kunwar Tek Singh to secure an advance of Rs. 900. A suit was brought by Kunwar Tek Singh on foot of this mortgage and an *ex parte* decree was passed on the 30th of January 1901. Kadam Kunwar died on the 19th of June 1902 and after her death the name of her daughter Rukmin Kunwar was substituted in the execution department in her place as her representative. The other daughter Janki Kunwar had died about 10 years previously. Rukmin Kunwar filed no objection in the execution department to the proceedings for sale of the mortgaged property, and the property has been advertised for sale. The plaintiff's case is that the mortgage was not made to meet any legal necessity and that Kadam Kunwar was not competent to mortgage her share beyond the period of her own life.

In his defence Kunwar Tek Singh set up the plea that under the will of her husband Musammat Kadam Kunwar became absolute owner of the share of the property given to her, and that in any case the mortgage in dispute was executed for valid

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necessity. These are the only pleas which have been relied upon before us; but it was further contended that the plaintiff has no right to maintain the suit during the life-time of his mother, he being merely a contingent reversionary heir to the property.

The learned Subordinate Judge held that upon the true construction of the will of her husband Kadam Kunwar became the absolute owner of the property in dispute; and he also held that the mortgage debt was incurred to meet a legal necessity and dismissed the plaintiff's claim. From this decree the present appeal has been preferred.

The will of Gayendra Narain is very simple in character. He says in it that with a view to avoid disputes in the future he executes the will, and he thereby declares that his wife Kadam Kunwar shall be the *malik* of a 10 anna 8 pie share in the village of which he was the owner, and his daughter by his first wife, Tulshi Kunwar, of a 5 anna 4 pie share. The word "*malik*" is a word of well known meaning, signifying the absolute owner of property. Its ordinary meaning is to be given to it, unless there are to be found in the will indications that it was not the intention of the testator to use it in its ordinary sense. No such indications are to be found in the will before us. On the contrary we are disposed to think that the expressed intention of the testator, namely, to avoid disputes in the future would be frustrated if a narrow construction were to be put upon the language used by him. If he intended his daughter Tulshi Kunwar merely to have a life-estate, we think that he would have expressed his meaning in clear terms, and the same observation applies to the gift to Kadam Kunwar.

The legal import of the word "*malik*" has been frequently considered, but we do not propose to discuss all the cases upon the subject. It will suffice if we refer to a few of them. In the case of *Lala Ramjeewan Lal* v. *Dal Koer* (1) the language of a will not unlike that before us was considered. In that case a Hindu, survivor of two brothers in a joint family governed by the Mitakshara law, died leaving a widow and two daughters, a brother's widow and three daughters of his brother. By his will he provided that his daughters and brother's daughters "shall be

(1) (1897) I. L. R., 24 Calc., 406.

maliks and come into possession in equal shares of all the movable and immovable properties." In their judgment Trevelyan and Beverley, JJ., say:—"*Primâ facie* there can be no question but that a gift, when there are no controlling words, is an absolute gift, and the expression 'maliks' used here would ordinarily imply an absolute gift. But it is contended that we must introduce into this will what is said to be the prevalent Hindu idea that a female ought not to obtain anything beyond an estate for her life-time, and therefore, although the word 'malik' is used, we must cut down the estate to the extent of an estate to a Hindu daughter. There is no authority for such a proposition. The words are absolute, and if they stood by themselves without anything to the contrary, it would be impossible for us to say that they did not give an absolute estate." In the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1) Lord Davey in delivering the judgment of the Privy Council observes (at p. 849):—"The words 'become owner (malik) of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose (that is to give an absolute interest) even without the words 'enjoy with son, grandson, and so on, in succession,' which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying a heritable and alienable estate." The gift in this case was not to the testator's widow but to his sister's son—but the language of Lord Davey is quite general. To the same effect is the decision of one of us sitting on the original side in Calcutta in *Raj Narain Bhadury* v. *Ashutosh Chuckerbutty* (2), which was affirmed on appeal (3). In that case the gift was to the testator's widow. The decision in *Jamna Das* v. *Ramautar Pande* (4) does not conflict with this decision. In that case the testator used language which showed that he did not intend to confer on his wife an alienable interest. We are unable to agree in the view taken by our brothers Knox and Aikman JJ., in the case of *Surajmani* v. *Rabi Nath* (5). In that case a Hindu executed a document to take effect after his death and thereby purported to transfer properties in favour of each of his two wives and

(1) (1897) I. L. R., 24 Calc., 834.
(2) (1899) I. L. R., 27 Calc., 44.
(3) (1900) I. L. R., 27 Calc., 649.
(4) (1904) I. L. R., 27 All, 364.
(5) (1903) I. L. R., 25 All, 351.

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also in favour of his daughter-in-law, in the following words:—"After my death they (*i.e.*, the donees) shall under this document get their names recorded in the public records in respect of the respective properties given to them and remain in possession as *owners* with proprietary powers." The words used are "*malik wa khud ikhtiar*," that is, "owners to deal with as they liked." It was held that these words did not confer an absolute estate. This decision appears to us to be in conflict with the canon of construction laid down by their Lordships of the Privy Council in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (1). The language of Lord Davey as to the true interpretation of the word "*malik*" is not confined to the case of a male but is quite general. Ordinarily it denotes absolute ownership. Even without the words "*wa khud ikhtiar*" we think that according to the ruling of the Privy Council the gift in question passed the absolute estate.

We find nothing in the will before us to qualify the language in which the gift to the testator's daughter and wife is expressed. Interpreting the language of the will therefore according to its ordinary signification, we are of opinion that Kadam Kunwar thereby acquired an absolute interest in the property, the subject matter of the gift to her. We agree in the view expressed by the Court below as to this. This disposes of the appeal, and it is unnecessary to consider the other questions which have been raised before us. We dismiss the appeal with costs.

Appeal dismissed.

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December 17.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HUSAINI BEGAM (DEFENDANT) v. MUHAMMAD RUSTAM ALI KHAN (PLAINTIFF).*

Muhammadan law—Suit for restitution of conjugal rights—Legal cruelty—Other misconduct of the plaintiff pleaded as a defence to the suit

In a suit for restitution of conjugal rights, the parties being Muhammadans, if the defendant raises a plea of legal cruelty, the facts to be proved to establish such a plea are similar to those which must be proved to establish

*Second Appeal No. 827 of 1905, from a decree of D. R. Lyle, Esq., District Judge of Moradabad, dated the 6th of May 1905, confirming a decree of Pandit Alopi Parsad, Additional Subordinate Judge of Moradabad, dated 7th of December 1904.

(1) (1897) I. L. R., 24 Calc., 834.

a similar plea under the English law *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) referred to.

But in a suit for restitution brought by the husband misconduct on the plaintiff falling short of legal cruelty may be a ground for the Court refusing relief. Thus where the plaintiff apparently only brought his suit on account of his wife having filed another suit against the plaintiff's father, and in his plaint accused his wife of immorality of the most serious kind, a charge which he totally failed to substantiate, it was *held* that the Court would be justified in refusing him relief. *Mackenzie* v. *Mackenzie* (2) referred to.

On the general facts of the case also it was found that the defendant had reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house, which was situated in a native State.

This was a suit for restitution of conjugal rights brought by one Muhammad Rustam Ali Khan against his wife Husaini Begam. The parties were married on the 2nd of November 1877, and at the time of the marriage the plaintiff's father agreed to pay the defendant Rs. 500 a month as pin-money. The plaintiff and the defendant lived together from 1883 to 1896, when the defendant, on the ground, as she alleged, of her husband's misconduct, left him and went to live with her father. Subsequently the defendant sued her father-in-law for arrears of the monthly allowance which he had agreed to pay her. In this suit a decree based upon a compromise was passed in favour of the plaintiff in the suit. Default was, however, made in the payment of the allowance in accordance with this decree, and Husaini Begam again sued her father-in-law for fresh arrears. After, and apparently in consequence of, this second suit on the part of Husaini Begam, the present suit was instituted by Muhammad Rustam Ali Khan on the 12th of July 1904. The Court of first instance (Additional Subordinate Judge of Moradabad) gave the plaintiff a decree for restitution as claimed. On appeal this decree was affirmed by the District Judge. The defendant thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

Mr. *Karamat Husain* and Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff Muhammad Rustam Ali Khan against his wife for restitution of conjugal rights. The plaintiff

(1) (1867) 11 Moo. I. A., 551. (2) (1895) A. C., 384.

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is the son of Khwaja Muhammad Khan, a Nawab of Dholepur, and was married to the defendant Husaini Begam, who is the daughter of a wealthy resident of Moradabad, now deceased, on the 2nd of November 1877. At the time of the marriage the plaintiff's father agreed to give the defendant Rs. 500 a month for pin-money. The plaintiff and the defendant lived together from the year 1883 up to the year 1896, when she left her husband and went to her father's house on the ground, as she alleges, of her husband's misconduct. She subsequently sued her father-in-law for arrears of the monthly annuity, agreed to be paid to her, up to 1901, and obtained a decree in the terms of a compromise. Her father-in-law failing to pay the annuity after the date of this decree, a suit was instituted by the defendant against him for arrears of it, from the 1st of May 1901 to the 31st of October 1903. The Court below dismissed her suit, but upon appeal to this Court the decision of that Court was reversed and a decree passed in her favour.†

During the pendency of that suit, the suit which has given rise to this appeal was instituted. In his plaint the plaintiff makes serious charges against his wife, alleging not merely that she had become immoral, but that she had actually committed adultery and was at the time, as a consequence of that adultery, pregnant. The following is the allegation in paragraph (6) of the claim:—"Although her parents are dead, yet the defendant lives alone at Moradabad, where there is no near relative of hers who may look after and take care of her. She wanders about wherever she likes and has become immoral. Moreover, she has now become pregnant by adultery." It is a significant fact that it only occurred to the husband to institute a suit for restitution of conjugal rights when the wife had taken legal steps to recover her arrears of annuity from his father. And it is also significant that he should desire to resume connubial relations with a person in the condition in which he alleges his wife to be.

In her defence the defendant avers that owing to the enmity subsisting between her and the plaintiff she has strong apprehension of danger to her life. She further alleges acts of immorality on the part of her husband, and that owing to pressure exercised

† *Vide supra*, p. 151—*Husaini Begam* v. *Khwaja Muhammad Khan.*

by his father he had shamelessly charged her with adultery. She further states that she has what she describes as magnificent houses of her own in the city of Moradabad, and that she is willing that her husband should live with her in that city as he formerly did, or arrange for a separate house at Moradabad. She charges in answer to the suit that it was brought in consequence of the institution of the suit for arrears of pin-money.

Both the Courts below have found that there is no reasonable apprehension of danger to the life of the defendant if she goes and lives with her husband in his house, or of serious maltreatment. The learned District Judge in the course of his judgment says:—"It is urged that the case at present pending in appeal before the High Court between the appellant in this case and the respondent's father shows that enmity exists and the fact that the respondent charged her with having committed adultery indicates that he would maltreat her were she to be compelled to live with him. I do not think that these facts are sufficient to warrant the conclusion that the danger of the woman being maltreated is so great as to justify the Court in a refusal to grant a decree for restitution of conjugal rights, and I note that the parties have admittedly lived together after the institution of the suit by the appellant against the respondent's father." From this we gather that in the opinion of the learned judge there is some danger. The last remark of the learned Judge refers to a visit paid by the plaintiff to the defendant in Moradabad.

A case such as the present must, as Mr. *Karamat Husain* has rightly said, be decided according to the Muhammadan law. This was so held in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1). Their Lordships of the Privy Council further in that case, at p. 611, say:—"The Muhammadan law on a question of what is legal cruelty between man and wife would probably not differ materially from our own, of which one of the most recent expositions is the following:—'There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it."

If it be granted that according to the Muhammadan law a husband may sue to enforce his right to the custody of his wife,

(1) (1867) 11 Moo. I. A., 551.

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and that, if her defence be legal cruelty, she must prove cruelty of the nature just described, it does not follow that she has no other defences to a suit for the restitution of conjugal right. In the case which we have cited their Lordships say (at p. 712):—"The marriage tie amongst Muhammadans is not so indissoluble as it is among Christians. The Muhammadan wife, as has been shown above, has rights which the Christian, or at least the English, wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the *Kazee* by the *Futwa* (if the law indeed warrants such a jurisdiction) of selecting a proper place of residence for the wife other than the husband's house." Lord Herschell, L. C., in the course of his judgment in *Mackenzie* v. *Mackenzie* (1) discussing the question whether in an action in Scotland for adherence by the husband, which corresponds to a suit for restitution of conjugal rights in England, misconduct on his part short of cruelty or other matrimonial offence may be a ground for refusing relief, observes (at p. 390):—"It seems to me open to question whether the Courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but has just stopped short of that which the law regards as *sævitia* or cruelty; can he, when his own misconduct has led his wife to separate herself from him, come into Court and, allowing his misdeeds, insist that it is bound to grant him a decree of adherence?"

Now we have it here that the defendant left her husband's house and came to Moradabad in 1896. From that time until the time when the suit out of which this appeal has arisen was instituted,

(1) (1895) A. C., 384.

namely, on the 12th of July 1904, plaintiff took no steps to obtain restitution of conjugal rights. It was only when the suit for arrears of pin-money was instituted by his wife against his father that he took action. This suggests the idea that the suit was not instituted with a view to renew happy connubial relations, but with the sinister object of giving trouble and annoyance to his wife. We find him in the plaint itself heaping the vilest insults upon her. He charges her with immorality and with adultery. In view of her parentage, position and fortune, this charge, if untrue, is sheer cruelty. If the plaintiff believed that there was any truth in it, it is hard to understand why he should desire to resume conjugal relations with a woman who had proved so faithless. If he believes it to be true, as we must assume he does, can we say that the defendant has not any ground for reasonable apprehension, that, if she return to Dholepur, a native State, in which she could not invoke the protection of the British law, she will be subject to maltreatment and violence. We think that the charge of immorality and adultery, which has not been substantiated, is of so cruel a nature as to justify a Court in refusing to grant him a decree for restitution of conjugal rights. The defendant in view of all the facts has established that she has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's house at Dholepur. We arrive at this conclusion as an inference of law from the facts found and admitted in the lower Courts.

The defendant states in her defence, and it is not denied, that she has property worth between 4 and 5 lakhs of rupees, and has houses in the city of Moradabad suitable to the position in life of her husband. She says that she has no objection to her husband residing with her in one of her houses as he did formerly, and that she has no objection to resume connubial relations with him in her own home or in a separate house, if he so choose, in Moradabad. We think under the circumstances that this offer is not unreasonable. The course then which we propose to adopt is to allow this appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit, upon the defendant's undertaking, as mentioned in the written statement, to live with her husband in Moradabad and there resume conjugal relations with him.

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If this undertaking be not fulfilled, liberty is reserved to the plaintiff to seek in another suit restitution of conjugal rights. We accordingly allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all Court.

Appeal decreed.

1906
December 18

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt and Mr. Justice Richards.

CHUNNI LAL AND OTHERS (PLAINTIFFS) *v.* THE NIZAM'S GUARANTEED STATE RAILWAY COMPANY, LD., (DEFENDANT) *

Contract—Railway Company—Receipt of goods by one company for carriage over its own and another Company's line—Liability in respect of overcharge made by delivering Company—Bye-laws—Power of Railway Company to alter the principle of calculation of rates.

Two wagon loads of chillies were received by the Station Master at Bezwada on the Nizam's Guaranteed State Railway for carriage to Agra station on the Great Indian Peninsula Railway at a rate of Rs. 270 per wagon for the whole distance. On arrival at Agra the Great Indian Peninsula Railway Company's station master demanded payment of higher rates, calculated per maund, and refused delivery until such rates were paid. The consignees paid under protest and sued both Railway Companies for a refund of the excess charges.

Held that the contract for carriage of the goods for the whole distance was one entire contract with the receiving company, who were liable for the overcharge, if any, wrongfully demanded from the consignees. *Muschamp* v. *Lancaster and Preston Junction Railway Company* (1), *Webber* v. *The Great Western Railway Company* (2) and *Kalu Ram Maigray* v. *The Madras Railway Company* (3) followed.

Held also that a bye-law of the Great Indian Peninsula Railway Company, which reserved to the Railway the right of remeasurement, reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or under-charged, did not authorize the Great Indian Peninsula Railway Company to alter the contract between the parties and charge at the place of destination maund rates instead of wagon rates.

* Second Appeal No. 628 of 1904, from a decree of H. G. Warburton, Esq., District Judge of Agra, dated the 16th of April 1904, reversing a decree of Babu Baidya Nath Das, Munsif of Agra, dated the 31st of November 1903.

(1) (1841) 8 M. and W., 421; 53 R. R., 758. (2) (1865) 3 H. and C., 771.
(3) (1881) I. L. R., 3 Mad., 240.

THE facts of this case are fully stated in the judgment of the Chief Justice.

The Hon'ble Pandit *Sundar Lal*, for the appellants.

Babu *Kedar Nath* and Babu *Mohan Lal Sandal*, for the respondents.

STANLEY, C. J.—This appeal is connected with Second Appeal No. 595 of 1904. The litigation arose under the following circumstances. The plaintiffs appellants, who carry on a grocery business at Rawatpara, Agra, under the style of Govind Ram Har Prasad, desiring to obtain chillies from Bezwada, inquired of the rate for the carriage of chillies per wagon load from Bezwada to Agra Fort and Agra Cantonment Stations from the station master at the Bezwada station on His Highness the Nizam's Guaranteed State Railway, and were informed by him by letter, dated the 13th of September 1902, that the rate was Rs. 270 per wagon load. The plaintiffs also made the same inquiry from the station master at the Agra Cantonment Station and obtained the same information. Acting upon this information they ordered two wagon loads of chillies from Bezwada and consigned the same to Agra Fort Station, obtaining two railway receipts, in each of which the freight at the rate quoted to them, *viz.*, Rs. 270 is entered. On the arrival of the goods at Agra Fort Station, the station master demanded payment of higher rates, namely, maund rates, and refused to deliver the goods except on payment of the higher rates. The plaintiffs in order to obtain delivery paid the excess under protest and took delivery. They then brought a suit against the Great Indian Peninsula Railway Company and the Nizam's Guaranteed State Railway Company for the recovery of the amount so paid in excess of the amount mentioned in the railway receipts, and they claimed a decree for this amount with interest by way of damages, against either or both the defendant Companies. The Railway Companies defended the suit, Mr. Alexander, District Traffic Superintendent of the Great Indian Peninsula Railway Company, representing both the Railways at the hearing before the learned Munsif. The Munsif dismissed the suit against the last mentioned Company, but held that the Nizam's Railway was liable to refund the amount paid in excess of the amount for which that Company agreed to carry the goods, as

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mentioned in the railway receipts. From this decree the Nizam's Railway appealed, but did not make the Great Indian Peninsula Railway Company a party to the appeal. In their memorandum of appeal they set up, amongst others, the following grounds of appeal, namely, that the amount claimed having been collected by the Great Indian Peninsula Railway the appellant Company was not liable to refund it; further that the appellant Company was not responsible for the quotations given by their station master at Bezwada, and that under the terms of the consignment note all goods were liable to recalculation of charges at destination. On the 23rd of January 1904, before the hearing of the appeal, the plaintiffs applied to the Court to bring upon the record the Great Indian Peninsula Railway Company as parties to the appeal. The learned District Judge, acting presumably under section 559 of the Code of Civil Procedure, acceded to this application and directed that a notice fixing the 25th of February 1904 for hearing should be issued. At the hearing it was contended on the part of the Great Indian Peninsula Railway Company that, inasmuch as the plaintiffs did not appeal against the decree of the Munsif so far as it dismissed their suit as against the Great Indian Peninsula Railway Company, no relief could be given to them in the appeal as against that company. The learned District Judge did not accede to this contention. He heard the appeal and came to the conclusion that the Great Indian Peninsula Railway Company was not justified in levying any freight over and above the amount specified in the freight notes, and was therefore liable to refund to the plaintiffs the amount claimed. Accordingly he decreed the claim of the plaintiffs against that company and allowed the appeal of the Nizam's State Railway.

In the view which I take of the case, it is unnecessary to determine the question whether the Court below was right in adding the Great Indian Peninsula Railway Company as a party to the appeal under the provisions of section 559 and in passing a decree against that company. This question is one of considerable difficulty. It seems to me, upon the facts which have been established in evidence, that the plaintiffs cannot in any event succeed as against the Great Indian Peninsula Railway.

The suit is one for damages for breach of a contract entered into with the Nizam's State Railway Company for the carriage of the goods from Bezwada to Agra Fort. Only one contract was entered into, namely, with the Nizam's State Railway. To this company the goods were delivered, and from it the freight notes were received. What the arrangements between the two companies are as regards the interchange of traffic has not been disclosed. When a railway company receives and undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates, this is evidence of a contract with the receiving company for the whole distance, and the other railway company will be regarded as their agents and not as contracting with the bailor—*Muschamp* v. *Lancaster and Preston Junction Railway Company* (1), *Webber* v. *G. W. Railway Company* (2). A receipt given by a railway company for goods to be sent to a place on another railway and there to be delivered for one entire sum is one entire contract for the whole distance and constitutes an entire contract with the railway which gave the receipt note. In the case of *Kalu Ram Maigraj* v. *The Madras Railway Company* (3) it was held that when two railway companies interchanged traffic, goods and passengers with through tickets, rates and invoices, payment being made at either end and profits shared by mileage, the receiving company by granting the receipt note for goods to be carried over and delivered at a station of the delivering company's line, does not thereby contract with the consignor of the goods as agents of the delivering company. The contract with the receiving company was held to be one and entire. So here in this case the contract was one and entire with the Nizam's State Railway Company and that railway alone appears to me to be responsible for the refusal to deliver the goods on payment of the freight agreed on.

For the foregoing reasons the suit against the Great Indian Peninsula Railway cannot in my opinion be maintained, but the Court of first instance properly, I think, held that the Nizam's State Railway Company is responsible in damages to the extent of the sum which was exacted from the plaintiffs by the Great

(1) (1841) 8 M. and W, 421; 58 R. R., 753. (2) (1865) 3 H. and C, 771.
(3) (1881) I L R, 3 Mad., 240.

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Indian Peninsula Railway in excess of the sum for which the Nizam's Railway Company agreed to carry the goods.

But it is said that the Company is protected by the provisions of paragraph 31 of the Great Indian Peninsula Railway Goods Tariff. This paragraph runs as follows:—"It must be distinctly understood that the weight and description of goods, as given in the railway receipt and forwarding note, are inserted for the purpose of estimating the railway charges and the railway reserves the right of remeasurement, reweighment, recalculation and reclassification of rates, terminals and other charges at the place of destination and of collecting before the goods are delivered any amount that may have been omitted or undercharged." It is contended that under this rule it is open to the companies to alter the contract between the parties and charge at the place of destination maund rates in lieu of wagon rates. I agree in the view expressed by the learned District Judge that this rule does not give the company the power for which the companies contend. The action taken by the Great Indian Peninsula Railway in exacting maundage instead of wagon rates cannot in my opinion be considered to be covered by any of the words "remeasurement, reweighment, recalculation, or reclassification of rates."

It was further urged that the station master at Bezwada had no authority to enter into a special contract on behalf of the company. The answer to this argument is that the contract was an ordinary and not a special contract.

I would therefore set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs against the Nizam's State Railway in all Courts. As the Great Indian Peninsula Railway has been the cause of this litigation I would direct that company to abide its own costs in all Courts.

BURKITT, J.—I concur.

RICHARDS, J.—I also concur.

BY THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside, and the decree of the Court of first instance restored with costs in all Courts, against the Nizam's State Railway Company. The Great Indian Peninsula Railway will abide its own costs in all Courts.

Appeal decreed.

APPELLATE CIVIL.

1906
December 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

RAGHUNATH PRASAD AND OTHERS (PLAINTIFFS) v. JAMNA PRASAD AND ANOTHER (DEFENDANTS).*

Mortgage—Same property mortgaged twice to same mortgagees—Part purchased by mortgagees under their decree on prior mortgage—Remainder liable for full amount of the subsequent mortgage

Sixteen villages were mortgaged by two mortgages of different dates to the same mortgagees. The mortgagees put their earlier mortgage into suit, obtained a decree, brought to sale 10 out of the 16 villages and purchased them themselves. *Held*, in a suit to sell the remaining villages in satisfaction of the second mortgage, that the remaining six villages were liable to the full extent of the second mortgage and not merely for a proportionate part of the money thereby secured. *Zahir Singh v. Bari Singh* (1) and *Bohra Thakur Das v. The Collector of Aligarh* (2) referred to

THE plaintiffs in this case held a mortgage, dated the 15th of December 1888, over sixteen villages belonging to the defendants, and a subsequent mortgage over the same property of the 4th of September 1894. They brought their earlier mortgage into suit, and having obtained a decree for sale caused ten out of the sixteen villages mortgaged to be sold and purchased them themselves. The present suit was brought on the 23rd of April 1904 for sale of the remaining six villages in satisfaction of the later mortgage of the 4th of September 1894. The Court of first instance (Subordinate Judge of Gorakhpur) gave the plaintiffs a decree for sale; but held that the six villages were not liable for the whole amount due in respect of the second mortgage, but only for a proportionate part thereof. The plaintiffs appealed to the High Court, contending that they were entitled to bring to sale the six villages for the whole amount due on their mortgage of the 4th of September 1894.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal*, for the appellants.

Pandit *Moti Lal Nehru*, and Babu *Iswar Saran*, for the respondents.

* First Appeal No 242 of 1904, from a decree of Babu Achal Bihari, Subordinate Judge of Gorakhpur, dated the 11th of July 1904.

(1) F. A. No. 63 of 1903, decided 20th April 1905. (2) (1906) I. L. R., 28 All., 698.

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STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit for sale on several mortgages, but the only one with which we are concerned is a mortgage of the 4th of September, 1894. By that mortgage 16 villages were hypothecated in favour of the plaintiffs to secure a sum of Rs. 32,000. There was a prior mortgage in existence at the date of this mortgage, namely, a mortgage of the 15th of December 1888, in favour of the same mortgagees. A suit was brought on foot of this mortgage, and a decree for sale was passed thereon, in execution of which 10 out of the 16 villages were sold and purchased by the plaintiffs, the mortgagees. The suit which has given rise to this appeal was brought by the plaintiffs on the 23rd of April 1904, for sale of the remaining six villages, to satisfy the later mortgage of the 4th of September 1894. The learned Subordinate Judge has given a decree for the sale of these villages, but decided that they were not liable to satisfy the whole of the mortgage debt, but only so much of it as is rateably attributable to them, holding that the 10 villages which had been previously sold must be treated as liable to satisfy a proportionate share of the mortgage-debt. In the course of his judgment the learned Subordinate Judge says :—"The plaintiffs say that they have a right to proceed against the six unsold villages mortgaged in this bond and to charge the whole amount upon them. I think this the plaintiffs cannot do. The above villages were liable to pay not only the amount due on the bond of 1888, but also a proportionate amount of the sum due on the bond in suit. As the plaintiffs have become the owners of these villages by their purchase at auction, they must contribute rateably towards the claim under the bond of 1894." We are wholly unable to agree with the learned Subordinate Judge in the view which he thus expressed. The 10 villages were sold to satisfy the earlier mortgage of the 15th of December 1888; and having been sold, those 10 villages must be treated as having been withdrawn from the operation of the later mortgage of the 4th of September 1894 by title paramount. This left the remaining villages alone liable to satisfy the puisne incumbrance. The learned Subordinate Judge is wrong in supposing that because the plaintiffs became the purchasers of the 10 villages, they must be treated as being in a different position from the

position of a stranger if a stranger had purchased at the auction sale. This is not a correct view of the matter. It is immaterial whether it was a stranger who purchased at the auction sale held in execution of the decree on the earlier mortgage or the plaintiffs to the suit. The fact that the plaintiffs became the purchasers cannot be regarded as having the effect of making the property which was included in the earlier mortgage responsible for the satisfaction of a later incumbrance. This question has been already decided by this Bench in *Zakir Singh* v. *Bansi Singh* (1). It was also the subject of decision in the case of *Bohra Thakur Das* v. *The Collector of Aligarh* (2).

We therefore allow the appeal, modify the decree of the Court below and give a decree to the plaintiffs for the relief claimed in the plaint, that is, for the recovery of the entire amount of their debt as against the six villages remaining subject to their mortgage in default of payment by the mortgagors of the amount found to be due. We extend the time for payment for a period of six months from this date. We direct that the decree be modified accordingly. The appellants will have their costs of this appeal.

Decree modified.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox and Mr. Justice Richards.

MULCHAND AND OTHERS (DEFENDANTS) *v.* MUHAMMAD ALI KHAN (PLAINTIFF) AND JADDU BIBI AND OTHERS (DEFENDANTS) *

Civil Procedure Code, section 396—Partition—Commission to make partition—Issue of commission to one person only

A Court issuing under section 396 of the Code of Civil Procedure a commission to make partition of immovable property not paying revenue to Government cannot legally issue such commission to one commissioner only.

Per RICHARDS, J.—But there is nothing to prevent the parties to partition proceedings agreeing that one commissioner only should be appointed; nor does it follow that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed.

* Second Appeal No. 811 of 1904 from a decree of J. Denman, Esq., District Judge, Cawnpore, dated the 1st of August 1904, modifying a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 31st of March 1904.

(1) F. A. No. 63 of 1903, decided 20th April 1905.

(2) (1906) I. L. R., 28 All., 593.

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THIS was a suit asking for the partition of certain immovable non-revenue-paying property, situated in the city of Cawnpore. There was no dispute as to the ownership of the parties or as to the proportionate shares to which they were entitled. The Court of first instance (Subordinate Judge of Cawnpore) appointed the amin of the Court as a commissioner under section 396 of the Code of Civil Procedure to make the partition, and he accordingly did so. The defendants Mulchand and others took exception to the manner in which the partition had been effected by the amin, but their objections were substantially overruled and the partition was adopted, but with some modification. The objecting defendants preferred an appeal to the District Judge, urging, amongst other pleas, that the procedure of the first Court was not in accordance with section 396 of the Code of Civil Procedure, inasmuch as that section made it incumbent on the Court to appoint more than one commissioner. The District Judge, however, rejected this plea on the ground that the appointment of one commissioner was in accordance with the usual practice, and was sanctioned by Rule 120 of the Rules of the High Court. Some further modification of the partition was made by consent of parties; but in the main the defendants' appeal was dismissed. The defendants thereupon appealed to the High Court, where the question of the legality of the appointment of one commissioner was again raised. The appeal was first heard before a division Bench consisting of Knox and Richards, JJ., on whose recommendation it was referred by the Chief Justice to a Full Bench.

Mr. *W. K. Porter*, for the appellants, argued that the express words of section 396 of the Code of Civil Procedure, especially when that section was read in its relation to the other parts of Chapter XXV of the Code, which deal with other kinds of commissions, clearly indicated that it was the intention of the Legislature that commissions to make partition should not be issued to one person only. *Bhiwaji Akoba* v. *Narayan Balaji* (1) was in favour of this view. To the contrary was the case of *Gayan Chunder Sen* v. *Durga Churn Sen* (2), but it was submitted that in that case the words of section 13 of the General Clauses Act, 1868, "unless there be something repugnant

(1) (1904) 6 Bom., L. R., 586. (2) (1881) I. L. R., 7 Calc., 318.

in the subject or context" had not been taken into account. Here the whole of section 396 and the rest of Chapter XXV was repugnant to the construction placed on the section under discussion in that case.

Munshi *Gobind Prasad* (for Babu *Satya Chandra Mukerji*), for the respondents, relied on the ruling of the Calcutta High Court, and more particularly on rule 120 of the rules of the High Court of the 4th of April 1894, which, it was contended, showed that the High Court, when framing rules for the subordinate Courts, had accepted the construction now sought to be placed by the respondents upon section 396 of the Code.

STANLEY, C. J.—This appeal has been referred to a Full Bench. It involves an important question arising out of the section of the Code of Civil Procedure dealing with commissions to make partition. The appellants contended in the Courts below that the allotment of shares by one commissioner is contrary to the provisions of section 396 and is illegal. This section, it is said, contemplates the appointment of more than one commissioner and renders it compulsory on the Court to appoint more than one. Chapter XXV of the Code deals with four classes of commissions, namely:—

(a) Commissions to examine witnesses;

(b) Commissions for local investigations;

(c) Commissions to examine accounts and

(d) Commissions to make partitions.

In the case of commissions to examine witnesses, section 385 expressly provides that the commission may be issued to any person whom the Court thinks fit to execute the same. In the case of commissions for local investigations likewise the Court may issue a commission to such person as it thinks fit. In the case of commissions to examine accounts, the language is the same. But when we come to commissions to make partitions, instead of the singular number we find the plural is used. In the first portion of the section (s. 396) the Court is empowered to issue a commission to such *persons* as it thinks fit. The second paragraph of the section provides that "the commissioners shall ascertain and inspect the property, etc., and the third paragraph directs the commissioners to "prepare and sign a report, or (if

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they cannot agree) separate reports appointing the share of each party." In this case the use of the plural "persons," and "commissioners," is noticeable. But it is argued that in view of section 13 of the General Clauses Act of 1897, the use of the plural is by no means decisive of the question before us. It is provided by that section that words in the singular shall include the plural and *vice versâ*, unless there is anything repugnant to this construction in the subject or the context. We have therefore to see whether there is anything in section 396 to make it repugnant to treat the plural nouns "persons" and "commissioners," as used in the section, as applicable to a single individual. In my opinion the direction in the third clause of the section shows beyond doubt that the Legislature intended that more than one commissioner should be appointed. That clause directs that the commissioners shall prepare and sign a report, or, if they cannot agree, separate reports. This shows that the appointment of two or more commissioners was in the contemplation of the Legislature. If it had been intended that one or more commissioners might be appointed, we should have expected to find before the words "if they cannot agree" words such as "in case there be two or more commissioners." It appears to me that the Legislature advisedly used the plural number in the case of commissions to make partition, and therefore that the Court cannot legally issue a commission to one commissioner only.

I would therefore allow the appeal on the ground that the allotment of shares carried out by one commissioner is contrary to law.

KNOX, J.—I fully agree and have nothing further to add.

RICHARDS, J.—I also agree, but it appears to me that there is nothing to prevent the parties to the partition proceedings agreeing that one commissioner only should be appointed, and I do not think it follows that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed.

BY THE COURT.—The order of the Court is that the appeal being allowed the decrees of both the lower Courts are set aside, and the case is remanded to the Court of first instance, through the lower appellate Court, with directions that it proceed with

the partition of the property in dispute according to law, appointing, unless the parties otherwise agree, at least two commissioners to make the partition. Under the circumstances we make no order as to the cost of this appeal. All other costs will abide the result.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt

RAM SARUP (PLAINTIFF) *v.* RAM DEI AND OTHERS (DEFENDANT) *

Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 125—Limitation—Alienation—Fictitious award—Hindu family.

A Hindu widow, plaintiff in a suit to recover property, in respect of which she was entitled to a Hindu widow's estate, from the possession of the widows of other members of her husband's family, entered upon a collusive arbitration by which the whole of the property of the plaintiff's husband was divided amongst certain female members of the family, it being declared that each of the parties to the arbitration proceedings took an absolute estate in the share allotted to her. *Held* that this proceeding amounted to an "alienation" of the property so dealt with within the meaning of article 125 of the second schedule to the Indian Limitation Act *Shee Singh v. Jeoni* (1) referred to

THE facts of this case are fully stated in the judgment of the Courts.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *B. E. O'Conor*, Babu *Jogindro Nath Chaudhri* and Munshi *Govind Prasad*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal against a decree of the learned District Judge of Shahjahanpur dismissing the plaintiff's suit by which he sought to obtain certain declarations.

The plaintiff Ram Sarup is grandson of one Balak Ram, deceased, by his daughter Musammat Ram Piari, and the defendants are Musammat Ram Dei, widow of Bahadur Lal, last

* First Appeal No. 273 of 1904, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 12th of September 1904.

(1) (1897) I. L. R., 19 All., 524.

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surviving son of Balak Ram, Musammat Kausila, widow of a predeceased son, and Kanhai Lal, own brother of the appellant. He is a nominal defendant.

Balak Ram left three sons and three daughters. None of the sons had male issue, but Babadur Lal, husband of the defendant Ram Dei, left by her a daughter Kirpa Dei who died in 1896. There has been some previous litigation in this family, in the course of which it has been held in this Court that the family was joint at the death of Bahadur Lal; that as he was the last full owner of the joint property, the defendant Musammat Ram Dei took a widow's life interest in it, and also that an adoption purporting to have been made by Musammat Parbati, widow of one of Balak Ram's sons, was invalid. It is admitted that the appellant Ram Sarup is as a Bandhu the next reversioner to the estate of his maternal uncle Bahadur Lal, expectant on the death of Musammat Ram Dei.

After the death of Bahadur Lal his brothers' widows Musammat Kausila and Musammat Parbati set up certain claims to possession of portion of his estate which had been recorded in their names in the village papers. Bahadur Lal died on May 24th, 1883.

On February 5th, 1892, Musammat Ram Dei instituted a suit against her two sisters-in-law Kausila and Parbati, in which she asked (1) for a declaration that as widow of the last full owner she was entitled to possession of the whole estate left by him, and (2) for recovery of possession of those portions of that estate which had been recorded in the names of her sisters-in-law.

The suit did not come to trial, for on August 1st, 1892, the plaintiff Ram Dei and her two sisters-in-law, the defendants, conjointly with Musammat Kirpa Dei (since deceased) the daughter of Ram Dei, and with Kanhai Lal, posing as the adopted son of Musammat Parbati, entered into a certain agreement by which they agreed that all the property (with certain exceptions, not material here) should be divided into four equal lots among the four female executants, each taking one lot, and that each of them should be "the owner and possessor of her share with proprietary power to make transfer of the same." The meaning of this is that four women, of whom not one had any title to the

absolute ownership of the estate or any part of it, and of whom only one had any title to present possession, purport by agreement, each to take and confer on each other full proprietary possession of portions of Bahadur Lal's estate. They then have recourse to the device of an arbitration (so often used in these Provinces as a cloak to fraud) and appoint one Badri Prasad, who was general agent of Musammat Ram Dei, to be their arbitrator for the purpose of dividing the entire landed property, houses and shops, etc., as specified in the agreement and deciding cases pending in the Civil and Revenue Courts as regards profits. The only duty imposed on the arbitrator is to divide the property into four lots in accordance with the agreement at which the executants had arrived.

The arbitrator made his award on January 12th, 1893, and Ram Dei's suit was dismissed on January 25th, 1893, "in accordance with the award made by the arbitrator Badri Prasad and dated the 12th January 1893," the parties to bear their own costs and to be bound by the award.

The present suit was instituted by Ram Sarup on the 29th June 1904. In his plaint he recited the previous proceedings set forth above and prayed for a declaration that the proceedings relating to the arbitration award of January 12th, 1893, and the decree of January 25th, 1893, are after the death of Musammat Ram Dei ineffectual as against the reversioner, and that they (the award and the decree) are null and void as against him.

In other clauses he asks for any other relief to which he may be entitled and for costs. The pleas raised by the defendants were principally that the suit was barred by limitation and that the defendant had acquired title by adverse possession.

The learned District Judge found for the plaintiff on the question of limitation, being of opinion that the suit was not time-barred. But on the main issue in the case he was of opinion that the plaintiff was bound by the decree of January 25th, 1893, on the award and therefore dismissed the suit. He founded his judgment chiefly on his view of the well known Shivaganga case and other cases which followed it. He apparently did not notice that in this case there was no trial in open Court between the contending parties and that the decree was founded on agreement between them.

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The plaintiff appeals, contending that the Court below was wrong in dismissing the suit on the ground that the plaintiff was bound by the decree of January 25th, 1893.

The learned counsel who represented the respondents frankly admitted at the hearing that he was unable to support the decree of the learned Judge on the ground taken by the latter as to the appellant being bound by the decree of January 25th, 1893. But while abandoning that question the learned counsel proceeded to support the decree on another ground which had been decided against the respondents in the lower Court, namely, that the suit when brought was time-barred. In this the learned counsel was clearly within his rights under section 561 of the Code of Civil Procedure. His contention was that the limitation rule applicable, is that of article 20 of the Limitation Act and not article 125 which had been applied by the learned Judge. If the former rule be applicable, the suit undoubtedly was time-barred when instituted.

Now *primâ facie* article 125 appears to fit the suit exactly. But the learned counsel contends that there has been no "*alienation*" by Musammat Ram Dei and that therefore the appellant is not entitled to the limitation period of twelve years provided by article 125 and that the suit must be taken to come under the general article 120. In this contention we are unable to concur. To work an alienation such as is contemplated by article 125 it is not necessary that there should be a formal deed of transfer by the female mentioned in that article. It is sufficient if an act be done by her which necessarily resulted in an alienation. Here we have Musammat Ram Dei, a Hindu widow, entitled to possession for her lifetime of her husband's estate, entering into an agreement with her daughter and sisters-in-law, none of whom had any title to present possession, to hand over to them three-fourths of the estate she had inherited from her husband, conferring on them not a life-interest such as she herself possessed, but an absolute proprietary interest, and to take a similar interest for herself in one-fourth portion of the estate which she retained for herself. To carry out this object she resorts to the device of an arbitration; appoints an arbitrator formally to divide the estate into four lots, and then on the making of the award has the latter presented to the Court before which her suit was pending and allows the suit

to be dismissed in accordance with the award which the decree made in the suit declares is to be binding on the parties.

Such an act in our opinion amounts to an alienation as far as Musammat Ram Dei was concerned. It was no doubt a *pretended alienation*, as she had no power to confer an absolute estate on her co-signatories to the agreement of August 1st, 1892; but it is such an alienation as is aimed at by article 125 of the Limitation Act. In this opinion we are supported by the case of *Sheo Singh* v. *Jeoni* (1) in which it was held that the action of a Hindu widow in allowing a collusive suit to be brought against her for possession of her late husband's estate and in confessing judgment and suffering a decree to be passed in favour of the plaintiff amounted to an alienation within the meaning of article 125 of the Limitation Act. In that decision and in the reason on which it is founded we fully concur. We find that in this case the widow Musammat Ram Dei did an act which necessarily resulted in the pretended transfer with an absolute title of portions of her husband's estate to her daughter and sisters-in-law.

We concur with the learned District Judge in holding that the suit is not time-barred. Mr. *O'Conor* for respondents also contended that the plaint disclosed no cause of action in that no relief was asked for in respect of the agreement of August 1892. To that it is sufficient to reply that in the plaint relief is asked against the proceedings relating to the arbitration award of January 1893 and the decree of January 25, 1893, which we interpret to mean all proceedings leading up to and resulting in that award and decree. The agreement of August 1892 and the appointment of Badri Prasad to divide the property, were, we have no hesitation in holding, proceedings relating to the award and as such were proceedings against which relief was prayed.

For the above reasons we allow this appeal. We set aside the decree of the District Judge and we remand the record to him for decision on the issues left undecided by him. The objection fails and is dismissed with costs. Appellant is entitled to the costs of this appeal.

Appeal decreed and cause remanded.

(1) (1897) I. L. R., 19 All., 524.

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PRIVY COUNCIL.

LAL BAHADUR AND OTHERS (PLAINTIFFS) v. KANHAIYA LAL (DEFENDANT)

[On appeal from the High Court at Allahabad]

Hindu law—Joint family—Presumption and onus of proof as to whether property is ancestral or self-acquired—Nucleus of ancestral property—Property purchased while living jointly—Will disposing of ancestral property—Invalidity of—.

A Hindu, the head of a joint family governed by the Mitakshara law, left property which on his death in 1849 passed to his three sons, who remained joint until 1866 when they came to a partition amongst themselves. There was nothing to show that any of them then had any separate property. At that time one of them had two sons and another son was born to him after the partition. The father and these three sons lived together jointly and acquired other property. The father died in 1894 leaving a will by which he gave a small allowance and a residence to each of his younger sons, and left all the rest of his property to his eldest son describing it as his self-acquired property. In a suit brought by the two younger sons against their brother to set aside the will, the validity of which depended on the question whether the property was ancestral or self-acquired, the Judicial Committee (reversing the decision of the High Court) held that the share taken on partition by the father of the plaintiffs and defendant was ancestral property in which from their birth his sons acquired an interest; that there thus being a nucleus of ancestral property the onus was on the defendant to show that the property in suit was self-acquired and not purchased with ancestral funds; that such onus had not been discharged; that on the contrary the evidence showed that there was a common stock of the whole family into which each member voluntarily threw what he might otherwise have claimed as self-acquired and that the property purchased by, or with the assistance of, the joint funds was joint property, and did not belong to any particular member of the family. There was therefore no self-acquired property, and the will was consequently inoperative to defeat the claim of the younger sons to a share in the family estate.

APPEAL from a judgment and decree (December 21st, 190.) of the High Court at Allahabad which varied and substantially reversed a decree (March 30th, 1898) of the Subordinate Judge of Bareilly.

The parties to the suit out of which this appeal arose were brothers, the sons of one Durga Prasad, who died on the 6th April 1894. Durga Prasad was one of the three sons of one Gobind Ram,

Present:—Lord DAVEY, Lord ROBERTSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

who was a patwari, or village accountant, the other two sons being Jwala Prasad and Hazari Lal. Gobind Ram died in 1849, at which time Durga Prasad was a student in Bareilly College, aged about 20, his younger brothers being about 18 and 11, respectively. In 1852 Durga Prasad entered the service of Government and after holding various offices in the Education Department became ultimately an inspector of schools on a salary of Rs. 750 a month. He retired in 1885 on a pension of Rs. 4,000 a year which he enjoyed until his death in 1894.

Durga Prasad left two wills, one made on the 3rd April and the other on the 11th December 1893. By the later will he fixed for each of the plaintiffs an allowance of Rs. 35 a month and gave to each of them a house for residence: the remainder of his property, movable and immovable, he bequeathed to his eldest son, the defendant. The will recited that all the property constituting the estate of Durga Prasad was his self-acquired property, and it set forth the reasons for the unequal distribution under it. Administration with the will annexed was granted to the defendant, and the objections to the grant raised by the plaintiffs on the grounds that the will was not genuine, and that if genuine it was made under undue influence, were disallowed; and the plaintiffs brought the present suit for a declaration that the two wills made by Durga Prasad were "opposed to Hindu Law, invalid and void," and that Durga Prasad was not competent to make them.

The plaintiffs in the plaint alleged that Gobind Ram possessed ancestral zamindari property and carried on money lending and left at his death property and cash to the extent of Rs. 35,000; that after his death considerable immovable property was purchased by his sons with funds left by him; that in 1866, the three sons divided the property and each took separate possession of his share; that the income arising from Durga Prasad's share was Rs. 400 a year; that this income was kept in deposit and was invested in money-lending; that the funds which thus accumulated were credited in the firm of Lachmi Naram at Bareilly; and that property was purchased, and additions were made to the ancestral property with the help of those funds They say that all the property thus acquired was ancestral joint property

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in which Durga Prasad's sons acquired a joint interest with him, and that according to Hindu Law he was not competent to divide the property unequally under his will, without the consent of all the co-sharers.

The defendant, on the other hand, alleged that Gobind Ram left no funds or immovable property, and that the whole of the property in suit was acquired by Durga Prasad himself with the savings from his income.

The Subordinate Judge held in the evidence that Gobind Ram left property worth Rs 20,000 or Rs. 25,000; that shares in two villages were purchased after his death with funds left by him; that Durga Prasad's share of the ancestral property yielded an income of Rs. 425 a year; that with the accumulations of this income other property was bought; that Durga Prasad threw into the common stock any property which he may have acquired separately, and that the whole of the property which existed at the time of his death was joint family property belonging to himself and his three sons.

As a result of these findings the Subordinate Judge held that the wills were invalid and void according to Hindu law, and made a decree in favour of the plaintiffs.

On appeal the High Court (BANERJI and AIKMAN, JJ.) delivered separate judgments, the result of which was to vary considerably the decision of the Subordinate Judge.

BANERJI J, said :—

"The principal questions we have to determine in this appeal are, firstly, whether Gobind Ram left any and what property, and secondly, whether the property in suit or any portion thereof is the self-acquired property of Durga Prasad. We shall also have to consider the further question whether Durga Prasad threw any of his self-acquisitions into the common stock."

After discussing at length the evidence on the first point he came to the conclusion that—

"I am unable to concur with the opinion of the Court below that the oral evidence proves that Gobind Ram died possessed of property of considerable value."

As to the second point he said :—

"Both parties agree that after the death of Gobind Ram his three sons, Durga Prasad, Jwala Prasad and Hazari Lal lived jointly as members of a joint Hindu family until a partition of the joint property was effected on

the 24th April 1866. At that time the following items of immovable property were owned by the three brothers :—

(1) Sagalpur ... . 8 biswas and odd.
(2) Fatehpur ... . 17 biswas and odd.
(3) Abhairajpur ... . 15 biswas
(4) Milak land in Karampur ... ... 20 bighas.
(5) Milak land in Bohit ... ... 5 bighas.
(6) Grove in Salehnagar ... ... 6 bighas and odd.
(7) Dwelling house.

The last two items were admittedly ancestral. Sagalpur, Fatehpur and the land in Karampur have been proved to have been acquired by the three brothers in 1851, or about that time. Sagalpur was purchased for Rs. 1,555 under sale-deed dated 3rd March 1851, and Fatehpur, by sale-deed dated 17th August 1851, for Rs. 1,605. The value of the land in Karampur is stated in the plaint to be Rs. 125 and there is nothing to prove the contrary. There is no evidence whatever to prove by whom the remaining items of property were acquired and when. It is contended that in the absence of evidence showing the source from which came the purchase money for the acquisition of these properties they must be presumed to be either ancestral property or property acquired with ancestral funds. With this contention I am unable to agree The property was undoubtedly the property of the three brothers who formed a joint family, but, as rightly observed by Mr. Mayne (Hindu Law, 6th edition, p 338), "property may be joint property without having been ancestral," and I am not aware of any presumption in Hindu Law that joint property must be deemed to be ancestral unless the contrary is shown. I agree with Farran, J., that "if in order that the plaintiffs should succeed in their suit it be necessary that the property . . . should be held to have been . . . ancestral property, it lies upon the plaintiffs to prove in some way or other that it was ancestral . . . . There is no presumption in Hindu Law upon the point which they can invoke in their favour." *Nanabhai Ganpat Rao* v. *Achratbai* (1). This view was approved by Sargent, C. J., and Bayley, J., in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (2) and we have not been referred to any authority in which a different opinion was held. The plaintiffs have not, in my judgment, given any credible evidence which proves that the property was acquired with ancestral funds. The learned Subordinate Judge says that as the sons of Gobind Ram had no income before 1852, it may be presumed that Sagalpur and Fatehpur were purchased by the three brothers with ancestral funds. This observation would have had considerable force had it been shown that there were ancestral funds with which the purchases could have been made, but there is no evidence worth the name on the point. Further, it is not strictly correct to say that the brothers had no income. Hazari Lal was, it is true, very young, but Jwala Prasad was holding the office of patwari. It is possible, and it is not improbable, that he and Durga Prasad raised money for the purpose of making the purchases Durga Prasad was at the time about 22 years of age. He had received education

(1) (1886) I. L. R., 12 Bom., 122, at p. 131. (2) (1890) I. L. R., 13 Bom., 331

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at the Bareilly College of a kind much superior to that generally obtained in those days by the son of a village accountant and expected to enter the service of Government, as he did about eighteen months later on a salary of Rs. 79 a month, not a very small sum in those days. He and Jwala Prasad were therefore in a position to borrow money for acquiring property. It must be admitted that there is no evidence that money was actually borrowed, but this is not to be wondered at having regard to the difficulty of obtaining such evidence after the lapse of nearly fifty years. There is, however, no *a priori* improbability as to the brothers having, as suggested, raised money on their own account for the purchase of property. Anyhow it was for the plaintiffs to prove the existence of ancestral funds and this they have failed to do. In the recent case of *Diwan Ran Bijai Bahadur Singh* v. *Indarpal Singh* (3) their Lordships of the Privy Council affirmed the rule that "he who claims property through some other person must show the property to have been vested in that person." In this case the plaintiffs claim the property which their father possessed at the time of partition in 1866 on the ground that that part of it was vested in Gobind Ram and the remainder was acquired with funds left by Gobind Ram. Upon the principle laid down by the Privy Council it was for them to establish their allegation, to use the words of Farran, J., "in some way or other." The dwelling house and the one-third share in the grove in Salehnagar yielded no income, and except the oral evidence which, as stated above, I consider to be untrustworthy, there is nothing to support the plaintiffs' allegations in regard to the rest of the property. The existence of an ancestral nucleus for the acquisition of other property has not, therefore, been established.

Even if it be assumed that the seven items of property mentioned above are either property left by Gobind Ram or property acquired with funds which belonged to him, I am of opinion that it has been satisfactorily shown that the income arising therefrom was wholly insufficient to form the nucleus for the subsequent acquisitions."

After referring to the expenses which had to be paid out of the income of Durga Prasad before it was available for further acquisitions he said:

"All these expenses could hardly be covered by the income of the property which he owned at the time of the partition; so that nothing went into his pocket which he could accumulate and employ in purchasing other property. In this respect the present suit closely resembles the case of *Lakshman Mayaram* v. *Jamnabai* (4). As in that case so in this the income from property which we may assume to be ancestral could not have formed the source from which was derived any part of the purchase money of the property acquired after partition, and therefore there was no nucleus of ancestral funds for the acquisition of that property.

From the above it follows that the property acquired after the partition of 1866 must have been acquired by Durga Prasad without the aid of ancestral

(3) (1899) I. L. R., 26 Calc., 871: L. R., 26 I. A., 226. (4) (1882) I. L. R., 6 Bom., 225.

funds and with his own separate earnings. There is, moreover, ample and satisfactory evidence which proves that the income of the property which existed before partition was not at all employed in the purchase of the property subsequently acquired This evidence is afforded by the accounts of the firm of Jado Rai, Baldeo Prasad, which the plaintiffs have caused to be produced."

After examining and considering the accounts he said:—

"The conclusion at which I have arrived is that it has not been proved that there was any nucleus of ancestral property, and that it has been established on the contrary that the acquisitions made by Durga Prasad were made with his separate funds and without the aid of ancestral funds

"The Court below has held that the separate acquisitions of Durga Prasad were thrown by him into the common stock and that they therefore formed the joint property of himself and his sons. This, it may be observed, was not the case set up by the plaintiffs in their plaint, but has been spelt out for them by the learned Subordinate Judge. No doubt, as Mr. Mayne says (p. 389, 6th edition) 'property which was originally self-acquired may become joint property, if it has been voluntarily thrown by the owner into the joint stock,' but he points out that 'to create such a new title, however, a clear intention to waive the separate rights of the owner must be established.' What is there in this case to show that Durga Prasad ever intended to waive his separate rights and to declare the whole of his property to be the joint property of himself and his sons? The only circumstance to which the Court below refers as indicating his intention is that he did not keep the income from the property separate from his salary, but 'amalgamated them into one general fund.' This certainly is not sufficient evidence of his intention to create a new title in his sons which they did not originally possess The whole of Durga Prasad's conduct towards the plaintiffs, the feeling of displeasure and dissatisfaction which he entertained for them, negatived the existence of such an intention. This is not a case of the blending of separate property with joint property or of separate funds with joint funds, and I am unable to agree with the view of the Court below on the point

"In my judgment the plaintiffs have failed to substantiate their claim except as to the grove in Salehnagar and the dwelling house called the 'dewankhana,' both of which are ancestral property. As to these two items of property the will of Durga Prasad cannot have any operation so as to deprive the plaintiffs of their vested interest in them. To this extent the decree of the Court below should, I think, be sustained, but the remainder of the claim must be dismissed, the appeal allowed and the decree of the Court below set aside."

AIKMAN, J., said:—

"I concur generally in the judgment which has just been delivered by my learned brother. In addition, however, to the items of property in respect of which he would sustain the decree of the lower Court, I would sustain that decree in respect of two other items, namely, the shares in Fatehpur and Sagalpur (items 6 and 7 in the first schedule attached to the plaint). These

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shares were purchased two years after the death of Gobind Ram by his three sons, who were then aged twenty-two, twenty and thirteen years, respectively. At the time of the purchase Durga Prasad had not entered Government employment. It is true that the second son, Jwala Prasad, was at the time a patwari, but his pay as such would not at the outside be more than Rs. 10 a month. I consider it in the highest degree improbable that these youths could raise money by borrowing for the purchase of these properties. I have no hesitation in saying that Hazari Lal has grossly exaggerated the amount of the property left by his father, but I believe that the father did leave enough to enable his sons to make the purchase referred to above. As has been shown by my learned colleague, the income of these two properties was not sufficient to form a nucleus for the acquisition of the other properties, which I agree in finding were acquired by Durga Prasad from his own savings."

The result of the decree of the appellate Court was by upholding the will of Durga Prasad of the 11th December 1883 to deprive the plaintiffs of all the property in suit except their shares in the grove in Salehnagar, the "Dewankhana," Fatehpur and Sagalpur.

On this appeal *W. A. Raikes* for the appellants contended that the High Court had wrongly placed the *onus* of proof on the appellants. As the family was a joint Hindu family and admittedly possessed of some ancestral property, the presumption was that the properties were all joint, and it was for the respondent to prove his contention that the properties in suit had been purchased by self-acquired funds. Reference was made to *Dhurm Dass Pandey* v. *Shama Soondri Dibiah* (1); and *Gopee Krist Gossain* v. *Ganga Persaud Gossain* (2). If there was only a nucleus of ancestral property that was all that was necessary, and it was shown by the evidence that there was a considerable amount of ancestral property. Such of the ancestral property as descended to Durga Prasad by inheritance, and any property purchased with ancestral funds, or the income of such ancestral property became joint property which vested in his sons at their birth, and which Durga Prasad was incompetent to deal with by alienation or by will without his son's consent. He could not therefore give it to one to the exclusion of the others unless the latter agreed to its being so dealt with. Here, it was submitted, the ancestral property contributed in a material degree to the acquisition of the funds with which the other properties were purchased, so that the

(1) (1843) 3 Moore's I. A. 229 (240) (2) (1854) 6 Moore's I. A. 53.

properties so acquired became joint property. *Rampershad Tewarry* v. *Sheo Churn Dass* (1); and *Luximon Row Sadasew* v. *Mullar Row Bajee* (2) were referred to. The augmentation or improvement of the joint property by one member with the aid of joint funds would make such augmentation or improvement joint property. Reference was made to *Guruchurn Doss* v. *Golukmonee Dossee* (3) and *Lakshman Mayaram* v. *Jamnabai* (4). As to the gains made by a member of a joint family who has received education out of the joint funds *Durvasula Gangadharudu* v. *Durvasula Narasammah* (5) was cited showing that such gains became joint and inalienable. There was only one account kept of all the funds, which showed that Durga Prasad mixed what would otherwise have been his self-acquired funds with the joint funds, and by so doing made them joint.

G. E. A. Ross for the respondent contended that the property in suit was the self-acquired property of Durga Prasad, and was not acquired by the use of joint ancestral funds. The evidence showed, and the High Court had rightly found, that Gobind Ram left but very little ancestral property, and that the income of Durga Prasad's share of it was quite insufficient, after meeting the expenses of his family, to enable Durga Prasad to acquire the properties now in suit. It was also proved that Durga Prasad had a considerable income of his own from which he could have acquired such properties, and after the admitted partition of Durga Prasad and his brothers the presumption was that he did so acquire them, and the onus had been rightly placed on the appellants to show they were acquired by joint funds. It was contended on the findings of the High Court, which, it was submitted, were correct, that there was no nucleus of ancestral property from which other properties could have been purchased, and that it was conclusively shown that Durga Prasad had purchased them with his self-acquired funds. "Nucleus" of ancestral property meant income of ancestral property, and there was never sufficient of such income to purchase the properties now in dispute. Reference was made to Mayne's Hindu Law, 7th edition, page 348 and the same authority, page 343, paragraph 275, 6th edition, page 333. Durga Prasad was

(1) (1866) 10 Moore's I. A. 490 (505).
(2) (1831) 2 Knapp, P. C. 60.
(3) (1843) 1 Fulton, 165 (174)
(4) (1882) I. L. R., 6 Bom., 225.
(5) (1872) 7 Mad., H. C., 47.

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therefore entitled to dispose of the property in suit (other than that excepted in the decree of the High Court), and his will was valid.

Raikes replied.

1907, *February 8th.*—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

The litigation in this case began between three brothers, sons of one Durga Prasad, two of whom, named Lal Bahadur and Jagdamba Prasad, brought a suit against their elder brother, Kanhaiya Lal, the present respondent, to set aside a will made by their father, which they contended was invalid and void according to Hindu law. Jagdamba Prasad has died since the institution of the suit, and his minor sons represent his interest in this appeal.

Durga Prasad was one of the three sons of one Gobind Ram, and it is admitted that he separated from his two brothers, Jwala Prasad and Hazari Lal, in 1866. Up to that time the three brothers had formed a joint Hindu family; but a complete partition of the family property, whatever it was, was then made between them. At the date of the partition, two of Durga Prasad's sons, Kanhaiya Lal and Lal Bahadur, were living; the third son, Jagdamba Prasad, was born subsequently.

The most important question which their Lordships have had to consider, has been, how much (if any) of the property then partitioned was ancestral; and this depends upon how much property was left by Gobind Ram at the time of his death in 1849. For the respondent it was at one time contended that "he left no funds or immovable property;" but that contention has since been abandoned. In the High Court, Banerji J., found that the only immovable property left by him was a grove in Salehnagar, which is valued at Rs. 666 in the plaint, and a dewankhana, which, it is admitted, was awarded to Durga Prasad at the time of the partition. But Aikman, J., while concurring generally with the judgment of Banerji, J., held that certain estates known as Fatehpur and Sagalpur must also be treated as having descended from Gobind Ram. And at the hearing before their Lordships, the learned Counsel for the respondent admitted that a third estate, named Abhairajpur, must be taken as standing on the same

footing as the two awarded by Aikman, J. There is therefore no doubt that these five properties at least were inherited from Gobind Ram.

There is evidence that he had other properties also. A witness called on behalf of the respondent, named Bhairon Prasad, who is quite unconnected with the family, but a relative of the banking firm by which Gobind Ram was employed, says that he used to see Gobind Ram. "He was a *patwari* (of several villages), and a *karinda* (agent) of Chaudhri Naubat Ram," the witness' uncle. "He used to come to Chaudhri Saheb's house." "He was worth twenty or twenty-four thousand rupees." As this witness was 21 years of age at the time of Gobind Ram's death, and was in the habit of sitting daily at his uncle's place of business, he would have the means of knowing something about the persons employed in his uncle's firm, though he might not be minutely acquainted with their affairs, and their Lordships see no reason for discrediting his testimony. It tends to confirm the evidence of Hazari Lal, who values his father's estate at forty-thousand rupees, and says that besides immovable property he had mortgages and monetary dealings which, after his death, were gradually realized in cash by his sons. Hazari Lal's evidence was disbelieved on some points by Banerji, J., but after making every allowance for exaggeration on his part, their Lordships cannot but come to the conclusion that Gobind Ram left considerable property both in land and securities for money.

This conclusion is supported by the circumstances of his family at and immediately after his death. It is conceded that he and his three sons constituted a joint Hindu family. When he died in 1849, his son Durga Prasad was about 20 years of age and a student at Bareilly College; Jwala Prasad was 17 or 18 years of age; and Hazari Lal 10 or 11. All three were maintained and educated at their father's expense. No one of them was in any employment until October 1852, when Durga Prasad, then a first-class student at the Bareilly College, was appointed Officiating Visitor of the Bareilly District, on a pay of Rs. 70 per month. For about three years, therefore, the three brothers had been living on funds which they had not earned; and as they had also, in 1851, purchased the two estates of Fatehpur

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and Sagalpur, to which reference has already been made, for Rs. 1,605 and Rs. 1,550, respectively, it is tolerably clear that the money for these purchases must have been provided from funds left by their father. Abhairajpur was still more valuable, as in 1870 it was leased, together with Fatehpur and a fraction of Sagalpur, at a jama of Rs. 1,300 per annum. There is evidence also that Gobind Ram had lands in Kunja and other villages; and it is certain that besides the dewankhana already mentioned he left several houses in Bareilly, which are still in possession of members of the family. There were also debts due to, and mortgages held by, him.

The property left by Gobind Ram, with its accretions, was held jointly by his three sons from the time of his death in 1849 until 1866. In that year a partition of the joint estates was made between the three brothers, and there is no suggestion that, at that time, any of them had any separate estate. The share then taken by Durga Prasad was undoubtedly ancestral property, as between him and his sons, who from the moment of their birth acquired an interest in it. And as after the partition he and his sons lived together as a joint Hindu family until the time of his death in 1894, it is clear that he had no right to dispose by will of, at all events, this part of his property.

But it was contended that any property acquired by Durga Prasad after the partition was acquired by him "without the aid of ancestral funds, and with his own separate earnings," and that he therefore had the right to dispose of it as self-acquired property. This argument derives support from the fact that, after entering the service of Government in 1852, Durga Prasad held various offices in the Education Department. In 1858 he was a Head Clerk in the English office, with a salary of Rs. 150 per month; in 1862 he was a head master on a salary of Rs. 200 a month; in 1866 he was appointed a Junior Inspector of Schools on Rs. 300 per month, and eventually he became an Inspector of Schools on a salary of Rs. 750 per month. In 1885, he retired on a pension of Rs. 4,000 a year. During the latter years of his life, therefore, he was in a position to save a fair portion of his income. But what are the circumstances of the case? It is admitted that Durga Prasad and his sons lived together as a joint Hindu family, and

it is established that there was a considerable nucleus of ancestral property in his hands after the partition. The onus was therefore on the respondent to prove that his subsequently acquired property was his separate estate. How has the onus been discharged? The most reliable evidence on the point is that contained in the books of Lachmi Narain, a native banker of Bareilly, with whose firm Durga Prasad kept an account from 1866, the year of the partition, until 1884, when it was closed. These books were produced on behalf of the appellant, and the clerk who produced them said:—"I knew Durga Prasad. He had an account with the firm. The income from villages and pay used to be deposited. There was but one account." So far as their Lordships are able to form an opinion, this appears to be a correct description, and it was not controverted by the learned counsel for the respondent. The entries show that properties of considerable value were from time to time purchased by Durga Prasad, and that he did not in any way discriminate between the sources of his income, but blended them all in one general account. There is oral evidence, also, that his sons when they became of age to earn their own living, gave the pay which they received to their father, with whom they lived and by whom they were supported. This is strong evidence that there was but one common stock of the whole family, into which each voluntarily threw what he might otherwise have claimed as self-acquired; and that the property purchased by, or with the assistance of, the joint funds, was joint property of the family, and not of any particular member of it.

In the last year of his life Durga Prasad became dissatisfied with the conduct of his two younger sons, and made and registered a will, dated 3rd April 1893, by which, in effect, he divided the family property, which he treated as having been "exclusively acquired" by himself, in unequal shares between his three sons. By a subsequent will, dated 11th December 1893, which practically revoked the former will, and the execution of which is not now contested, he gave an allowance of Rs. 35 per month, and a dwelling-house to each of his two younger sons, and left the whole of his remaining property to his eldest son, the present respondent. In this will no particulars of his property are given, but it purports to deal with "all the movable and immovable properties which

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will constitute my estate on my death and which are my self-acquired properties."

In the view which their Lordships take of this case, there were no properties of Durga Prasad at the time of his death which, according to Hindu law, could be classified as self-acquired, and the will is therefore inoperative to defeat the claim of the younger sons to a share in the family estate. They will therefore humbly advise His Majesty that the appeal ought to be allowed and the judgment of the High Court reversed with costs, and that the decree of the Subordinate Judge of Bareilly, dated 30th March 1898, ought to be confirmed. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants:—*T. C. Summerhays & Son.*

Solicitors for the respondent:—*Barrow, Rogers & Nevill.*

J. V. W.

APPELLATE CIVIL.

1906

November 30.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PREONATH MUKERJI (PLAINTIFF) *v.* BISHNATH PRASAD (DEFENDANT).*

Civil Procedure Code, section 43—Suit to recover fees for medical attendance—Fees partly secured by a promissory note—Separate suits upon the promissory note and for the unsecured balance—Latter suit barred

A, a doctor, agreed with *B* to accompany *B* to Hardwar as his medical attendant on a fee of Rs. 100 a day. After seven days *B* gave *A* a promissory note for Rs. 700, representing seven days' fees. *B*, who was a vakil, also promised to assist A professionally in certain litigation. *B*, however, died before he could fulfil his agreement to render professional services. *A* sued B's son upon the promissory note first, and subsequently in a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares. *Held* that the second suit was barred by the provisions of section 43 of the Code of Civil Procedure so far as the fees for attendance at Hardwar were concerned, though not in respect of the other fees claimed.

IN this case the plaintiff had been the medical attendant of the father of the defendant. The plaintiff alleged that in June

* Second Appeal No. 905 of 1905, from a decree of G. A. Paterson, Esq., District Judge of Benares, dated the 6th of June 1905, confirming a decree of Babu Hira Lal Sinha, Munsif of Benares, dated the 15th of February 1905.

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1903, when his patient Raghunath Prasad was seriously ill, he accompanied him to Hardwar as medical attendant on the express agreement that he would receive as remuneration Rs. 100 per diem The plaintiff says that he treated Raghunath Prasad at Hardwar for 13 days, and, therefore, according to the contract, in respect of this attendance he was entitled to a sum of Rs. 1,300. He alleges that on the 13th of July 1903, Raghunath Prasad executed a promissory note in his favour for Rs. 700 in respect of the fees for seven days and undertook to act as his pleader in certain legal proceedings instituted by the plaintiff in lieu of the fees, amounting to Rs. 600, for the remaining six days. Raghunath Prasad died on the 26th of October 1903, and so was unable to render any legal assistance to the plaintiff in the suit in question. After the death of Raghunath Prasad, the plaintiff instituted a suit against his son Bishnath Prasad, the present defendant, to recover the amount due on the promissory note abovementioned. The present suit was brought to recover fees for the remaining six days at Hardwar, as well as for subsequent attendance at Benares from the 21st October 1903 to the 26th October 1903. The Court of first instance (Munsif of Benares) gave the plaintiff a decree in one suit for Rs. 700 on the promissory note, but dismissed the other suit on the merits. On appeal the District Judge confirmed the Munsif's decree in the second (the present) suit holding that sections 43 and 45 of the Code of Civil Procedure barred the claim. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *W. Wallach* and Babu *Satya Narain*, for the respondent.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit which was instituted by the plaintiff to recover fees alleged to be due to him by the defendant in respect of the medical treatment of the late Babu Raghunath Prasad, the father of the defendant, and also fees for the treatment of the defendant. The Courts below have dismissed the suit on the ground that an earlier suit was instituted, which is said to have been in respect of the same cause of action. That was a suit for Rs. 700 for fees for seven days out of thirteen days in which the plaintiff attended at Hardwar upon Raghunath Prasad. The lower appellate Court held

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that the claim now put forward, which is in respect of fees for the remaining six days of the thirteen and for fees of later attendances, ought to have been put forward in the former suit, and not having been put forward in that suit, it is barred by the provisions of section 43 of the Code of Civil Procedure. That section provides that every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. The facts as alleged by the plaintiff are, that in the month of June 1903, when Raghunath Prasad was seriously ill, he accompanied him to Hardwar as medical attendant on the express agreement that he would receive as remuneration Rs. 100 per diem. The plaintiff says that he treated Raghunath Prasad at Hardwar for thirteen days, and therefore, according to the contract, in respect of this attendance he was entitled to a sum of Rs. 1,300. He alleges that on the 13th of July 1903, Raghunath Prasad executed a promissory note in his favour for Rs. 700 in respect of the fees for seven days and undertook to act as his pleader in certain legal proceedings instituted by the plaintiff in lieu of the fees amounting to Rs. 600 for the remaining six days. Raghunath Prasad died on the 26th of October 1903, and so was unable to render any legal assistance to the plaintiff in the suit in question. The plaintiff now claims in the present suit the recovery of the Rs. 600 remaining unpaid, as also fees in respect of subsequent attendance at Benares upon Raghunath Prasad and the defendant from the 21st of October 1903 to the 26th of October 1903. The lower appellate Court has, as we have said, held that suit is barred by the provisions of section 43.

As regards the claim in respect of the Rs. 600 which is alleged to be payable under the agreement entered into for the treatment of Raghunath Prasad at Hardwar, we think the lower appellate Court was right. The cause of action which is set up in this case, so far as regards the attendances at Hardwar, is the same cause of action as gave rise to the earlier suit. The cause of action was in reality the breach of the agreement alleged in the second paragraph of the plaint to pay a fee of Rs. 100 per day for the attendance of the plaintiff on Raghunath Prasad at Hardwar. It is true that Raghunath Prasad executed a promissory note to secure the payment of Rs. 700 on account of fees for seven days, but the

fact that this security was given does not take the case out of section 43 because of the proviso to that section, which is in the following terms:—"For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action." The contention, therefore, that the cause of action on the promissory note is one cause of action, and the cause of action for the recovery of the balance of Rs 600 forms another cause of action, is not well founded. The cause of action is in reality, as we have said, the breach of the agreement to pay Rs. 100 per diem for attendance at Hardwar. When then the plaintiff instituted his suit for the recovery of the amount of the promissory note he ought in our judgment, to have included in his claim a claim for the balance of Rs. 600. Owing to the death of Raghunath Prasad the agreement which he had entered into to appear as a pleader for the plaintiff in satisfaction of portion of the claim, became incapable of being fulfilled, and this occurred before the institution of the plaintiff's first suit. At that time the plaintiff was in a position to fall back upon the provisions of the agreement as it originally stood. We therefore think that as regards this portion of the claim the appeal must fail.

The claim, however, includes a claim for fees for attendance at Benares in the month of October 1903. This attendance was not provided for in the agreement which is set forth in paragraph 2 of the plaint. The same considerations, therefore, do not apply to it. It really is a claim for reasonable remuneration for services rendered by the plaintiff to Raghunath Prasad and his family and does not come within the purview of the earlier agreement. In respect of this matter it would appear that a separate cause of action arose. This indeed the learned counsel for the defendant respondent admits.

We therefore must allow the appeal as regards this portion of the claim for medical attendance at Benares from the 21st of October to the 26th of October 1903. This portion of the claim the learned District Judge has not considered. He has peremptorily disposed of it as being obnoxious to the provisions of section 43. We think that that section does not preclude the plaintiff from pressing this portion of his claim. We, therefore, so far as this portion of the claim is concerned, set aside the decree of the lower

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appellate Court and remand the appeal to that Court with directions that it be re-admitted on the file of pending appeals in its original number and be disposed of on the merits. In all other respects the appeal is dismissed. We think that under the circumstances the respondent is entitled to half the costs of this appeal, and we so direct. We say nothing as to the costs of the plaintiff appellant.

Decree modified.

1906
December 18.

Before Mr. Justice Sir George Knox.

PIRBHU NARAIN SINGH (DECREE-HOLDER) *v.* BALDEO MISRA (JUDGMENT-DEBTOR).*

Act No. IV of 1882 *(Transfer of Property Act), section* 90—*Mortgage—Mortgaged property totally incapable of being sold—Decree under section* 90 *not obtainable.*

Where property mortgaged was property which the mortgagee could by no possibility bring to sale in execution of a decree under his mortgage, it was *held* that no decree over under section 90 of the Transfer of Property Act, 1882, could be granted. *Kedar Nath* v. *Chandu Mal* (1) distinguished.

THIS was an application by a mortgagee for a decree over under section 90 of the Transfer of Property Act, 1882, based upon the ground that inasmuch as the property mortgaged had been found not to belong to the mortgagor at all, the mortgagee was entitled to the remedy sought. The Court of first instance (Munsif of Benares) dismissed the application, and this order was affirmed by the District Judge on appeal. The decree-holder appealed to the High Court, which remitted an issue as to the interest possessed at the time of the mortgage and at the time of the application under section 90 by the mortgagor in the mortgaged property. The finding returned was that the mortgagor had no rights in the holding mortgaged at either time.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

The respondent was not represented.

KNOX, J.—The finding to the issue sent down is to the effect that the property mortgaged is an occupancy holding of which the

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* Second Appeal No 290 of 1905, from a decree of G A. Paterson, Esq., District Judge of Benares, dated the 13th of January 1905, confirming a decree of Babu Hira Lal Sinha, Munsif of Benares, dated the 1st of October 1904.

(1) (1903) I. L R., 26 All., 25.

mortgagor was not the tenant at the date of the last settlement, nor is at the present day. The result is that the appellant finds himself with the property mortgaged to him, which, so far as he is concerned, is non-existent and which he certainly cannot bring to sale. The learned vakil who appears for the appellant cannot refer me to any ruling which goes so far as to say that an order may be granted under section 90 of the Transfer of Property Act, where no property has been put to sale because from no fault of the mortgagee the property mortgaged to him cannot be brought to sale. The remedy given by section 90 is an extraordinary remedy and must, therefore, be applied with great care and jealousy. In the present case it does seem a hardship that the mortgagee is deprived of his security from no fault of his own, and is now barred from enforcing a personal remedy in the ordinary way. The learned vakil asks me to apply the principle laid down by Aikman, J., in *Kedar Nath* v. *Chandu Mal* (1) where, at page 27, the learned Judge remarks as follows:—"In the present case the respondent brought to sale the whole of the mortgaged property which he could sell, and has thus exhausted his rights under the order absolute," and further on adds:—"It appears to me that on this state of facts it would be in the highest degree inequitable to refuse him a decree by which alone he can recover from his judgment-debtors the unpaid balance of money which they owe him." But the procedure adopted by the decree-holder in that case was one which could be brought into harmony with sections 88, 89 and 90 of the Transfer of Property Act. In the present case it is not so. It seems to me I have no alternative but to dismiss the appeal, but without costs, as no one appears for the respondent.

Appeal dismissed.

(1) (1903) I. L. R., 26 All., 25.

1906
December 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt

MUNSHI AND OTHERS (DEFENDANTS) *v.* DAULAT AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage—Redemption—Effect of purchase by mortgagees of part of the mortgaged property.

When the integrity of a mortgage has been broken up upon the purchase by the mortgagees of the equity of redemption in a portion of the mortgaged property, the right of redemption of each of the several mortgagors is confined to his own interest in the mortgaged property; he cannot redeem the remainder of the mortgaged property against the wishes of the mortgagees. *Nawab Azimut Ali Khan* v. *Jowahir Sing* (1), *Kuray Mal* v. *Puran Mal* (2) and *Gurtuk Chunder Dey* v. *Juramoni De* (3) followed.

THIS was a suit brought by nine persons alleging themselves to be the heirs of the original mortgagors to redeem a usufructuary mortgage. The Court of first instance (Additional Munsif of Ghaziabad) found the interests of the mortgagors in the property mortgaged were separate, and also that the plaintiff Daulat was the only one of the plaintiffs who was in fact entitled to redeem as heir to one of the original mortgagees. That Court accordingly gave Daulat a decree for redemption of his share. The plaintiffs appealed. The lower appellate Court (Subordinate Judge of Meerut) found that the original mortgagees, Jwala Nath and Debi Singh, had sub-mortgaged their rights under the mortgage in suit, and that some of these sub-mortgagees had acquired by purchase portions of the mortgaged property. This circumstance, however, had not, according to the Subordinate Judge, the effect of destroying the integrity of the mortgage. In the result the lower appellate Court gave Daulat a decree for redemption of the whole of the mortgaged property. The defendants appealed to the High Court.

Munshi *Gokul Prasad*, for the appellants.

Mr. *R. K. Sorabji*, Babu *Durga Charan Banerji*, Babu *Gordhan Lal Agarwala* and Babu *Lakshmi Narain*, for the respondents.

* Second Appeal No. 1078 of 1905, from a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 27th of May 1905, reversing a decree of Pandit Suraj Narain Majju, Additional Munsif of Ghaziabad, dated the 30th of November 1903.

(1) (1870) 13 Moo. I. A., 404. (2) (1879) I. L. R., 2 All., 565.
(3) (1900) 5 C. W. N., 83.

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STANLEY, C.J., and BURKITT, J.—The question raised in this appeal appears to us to be concluded by authority. It is this—whether, when the integrity of a mortgage has been broken up upon the purchase by the mortgagees of the equity of redemption in a portion of the mortgaged property, one of several mortgagors is entitled to redeem the remainder of the mortgaged property against the wish of the mortgagees, or is his right of redemption confined to his share of the property? In the case of *Nawab Azimut Ali Khan* v. *Jowahir Sing* (1) their Lordships of the Privy Council held that co-mortgagors, who were entitled to a portion of mortgaged property, could not redeem against the will of the mortgagee any portion of the mortgaged property save their own village. They held that the mortgagors could not acquire the interest of the mortgagee in other parts of the mortgaged property against the will of the mortgagee. They say in the course of their judgment that "the appellant (*i.e.*, the mortgagee), if desirous of retaining possession of these villages as mortgagee is entitled to do so against the plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Husseinpur upon payment of so much of the sum deposited in Court as represents the portion of the mortgage-debt chargeable on that village." In this Court in the case of *Kuray Mul* v. *Puran Mal* (2), Spankie and Oldfield, JJ., adopted the same view and quoted the authority of the case to which we have referred. In that case it was held that where all the proprietors of an estate joined in mortgaging it, and the mortgagee subsequently purchased the share of one of the mortgagors, and one of the mortgagors sued to redeem his own share and also the share of another of the mortgagors, he could only redeem his own share. To the same effect is the decision of Rampini and Sale, JJ., in the case of *Girish Chunder Dey* v. *Juramoni De* (3). In view of these decisions we must allow the appeal; but before we can finally determine it, we must have findings of the lower appellate Court upon certain issues. These are as follows:—

(1) What portion of the mortgaged property has been purchased by the defendants, or any of them, and how

(1) (1870) 13 Moo. I. A., 404 (2) (1879) I. L. R., 2 All., 566.
(3) (1900) 5 C. W. N., 88.

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much of it still remains subject to the mortgage of the 10th of July 1843 in the pleadings mentioned?

(2) What portion or share of the mortgaged property belongs to the plaintiffs and what proportion of the mortgage-debt is chargeable against that portion or share, regard being had to the provisions of section 82 of the Transfer of Property Act?

We remand these issues to the lower appellate Court under the provisions of section 566 of the Code of Civil Procedure, and direct the Court to take such additional evidence as may be requisite. On return of the findings the parties will have the usual ten days for filing objections.

Issues remitted.

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January 3

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt

RAM KISHAN SHASTARI (PLAINTIFF) v. KASHI BAI (DEFENDANT) *

Act No. XV of 1877 (Indian Limitation Act), section 12—Limitation—"Time requisite for obtaining a copy"

The words 'the time requisite for obtaining a copy' in the second and third paragraphs of section 12 of the Indian Limitation Act, 1877, are not confined to cases where the person appealing has in person or by a properly authorized agent applied for a copy of a judgment or decree. *Ramamurthi Aiyar* v. *Subramania Aiyar* (1) dissented from.

THIS was an appeal under section 10 of the Letters Patent of the Court from a judgment of KNOX, J. The facts of the case are set forth in that judgment, which was as follows :—

KNOX, J.—The sole question which has to be considered in this second appeal is whether the words used in section 12 of the Limitation Act No. XV of 1877, namely, 'the time requisite for obtaining a copy of the judgment on which the decree appealed against is founded' and the similar words in the preceding paragraph, namely, 'the time requisite for obtaining a copy of the decree appealed against,' refer only to cases in which the person appealing has in person or by a properly authorized agent applied for the copy of the judgment or decree. The date of the decree is the 30th June 1904. The defendant

* Appeal No. 50 of 1906 under section 10 of the Letters Patent.

(1) (1902) 12 Mad., L. J., 386.

apparently left it to her vakil to obtain a copy of the decree and of the judgment. It may fairly be inferred that her object in obtaining the copy of the judgment and decree was, as the lower appellate Court has found, to consider whether an appeal should or should not be filed. The appellant's vakil left the matter in the hands of his clerk, who applied for a copy of the decree and judgment on the 5th of July, 1904. The copies applied for were not prepared until the 18th of July 1904. The real reason for the delay was, not that ostensibly given by the copying department, but, as the learned Judge points out, the fact that the decree was not drawn up until the 16th of July. Notice of the copies being ready was posted on the 18th July. It is allowed, and properly allowed, that if the application had been made by the appellant herself or by her vakil or by some recognised agent, she would have been entitled to the whole of the 14 days that were requisite in this case for obtaining the copies of the decree and judgment. The lower appellate Court has, however, refused to grant any portion of this time, holding that the appellant is only entitled to get the benefit of the time taken in preparing the copy of the decree, when the copy is applied for by herself or on her behalf and with the intention of appealing. This view taken by the learned Judge is attacked in this appeal before me. In support of it the learned vakil for the respondent has called my attention to a case which is to be found in 12 Madras, L. J., p. 385, *Ramamurthi Aiyar* v. *Subramania Aiyar*. The view taken by the lower appellate Court is undoubtedly supported by the ruling cited above, but the judgment in that case is one which assigns no reason of any kind whatever for the opinion expressed therein and with all due deference to the learned Judges who decided that case, I am not prepared to read into section 12 of Act No. XV of 1877, the words '*when the copy is applied for by the party appealing or on his behalf and with the intention of appealing.*' The Limitation Act is an Act which takes away existing rights, and the language of such an Act should be very carefully construed. In the present case it would be inconsistent with the language of the section to hold that because the appellant left this matter to her vakil and the vakil left it to his clerk she is to be deprived of the time which she would otherwise have got

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if she had signed the application herself and handed it over to the same clerk for presentation to the Munsarim. Indeed the danger of holding this view is in the present case accentuated by the fact that the decree was not ready until the 16th of July, and the lady would have had only 14 days instead of 30 days, if the time occupied in preparation of the decree be not allowed to her. The appeal therefore prevails. I set aside the decree of the lower appellate Court upon this preliminary point, and remand the case under section 562 of the Code of Civil Procedure, to that Court with directions to re-admit the appeal to its original number of pending appeals in the register, and to dispose of it according to law. Costs will follow the event.

On this appeal:—

Dr. *Tej Bahadur Sapru*, for the appellant.

The respondent was not represented.

STANLEY, C. J., and BURKITT, J.—We agree with the learned Judge of this Court in the conclusion at which he arrived. We think it would be unduly restricting the language of section 12 of the Limitation Act if we were to hold, as did the lower Court, that the application for a copy of the judgment must necessarily be by the appellant or somebody proved to have been acting in the matter as her agent. The language of section 12 is very general. It provides that the time requisite for obtaining a copy of the decree shall be excluded in the computation of time. The section does not say by whom the copy is to be obtained, nor does it introduce the words which have been suggested as necessarily embodied in the section, showing that the copy must be obtained for the purposes of an appeal. We dismiss the appeal with costs.

Appeal dismissed.

1907
January 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

PARBATI KUNWAR AND OTHERS (DEFENDANTS). v. MAHMUD FATIMA AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code, section 45—Misjoinder of causes of action—Multifariousness—Property claimed under one title from defendants professing to hold under various titles

The plaintiffs sued as heirs of their father to recover various portions of their father's estate from the hands of different alienees. *Held* that the fact that the defendants set up different titles to the various portions held by them would not make the suit bad for multifariousness. The plaintiffs had one cause of action, namely, the right on the death of their father to recover their shares of his property. *Ganesh Lal* v *Khairati Singh* (1) distinguished. *Ishan Chunder Hazra* v *Rameswar Mondol* (2), *Nundo Kumar Naskar* v. *Baumali Gayan* (3), *Indar Kuar* v *Gur Prasad* (4) and *Mazhar Ali Khan* v *Sajjad Husain Khan* (5) referred to

THE facts of the case out of which the present appeal arises are as follows:—

One Kazi Ahmad Husain, who was the owner and in possession of the entire village of Yasinnagar and also of a ten biswa share in the village of Khardauli and of some bighas of resumed *muafi* land in another village, died on the 2nd of August 1892, leaving his widow, the first defendant, and the defendants Husain Ahmad and Muhammad Ahmad, two sons, and the plaintiffs, his two daughters, him surviving. After his death in satisfaction of a decree obtained by one Gandharp Singh, 5 biswas of Yasinnagar and 5 biswas of Khardauli and a third of the *muafi* land were foreclosed and possession delivered over to the judgment-creditor. Later on, namely, on the 18th of January 1899, a further share in the village of Yasinnagar was sold by the widow and two sons to the defendants 6, 7 and 8 and another party, the ancestor of the defendant No. 5. Again, under a sale-deed, dated the 25th of July 1904, a 5 biswa share in the village of Khardauli was transferred to the defendants 5 and 7. The suit out of which this appeal has arisen was instituted on the 12th of September 1904, by the plaintiffs as two of the heirs of

*Second Appeal No 1074 of 1905 from a decree of B J. Dalal, Esq., District Judge of Mainpuri, dated the 30th of June 1905, confirming a decree of Aziz-ur-Rahman, Esq., Subordinate Judge of Mainpuri, dated the 31st of March 1905.

(1) (1894) I L. R., 16 All., 279.
(2) (1897) I. L. R., 24 Calc., 831.
(3) (1902) I L. R., 29 Calc, 871.
(4) (1889) I. L. R., 11 All., 33.
(5) (1902) I L. R., 24 All., 358.

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Ahmad Husain to recover from the defendants 14 out of 48 *sihams* of the property which had passed into the hands of the judgment-creditor and transferees respectively under the decree and deeds of transfer referred to above.

The Court of first instance (Subordinate Judge of Mainpuri), decreed the plaintiff's claim, and the lower appellate Court (District Judge of Mainpuri), upheld the decision of the Court of first instance.

From this decree the defendants appealed to the High Court.

Mr. *M. L. Agarwala*, Mr. *Muhammad Ishaq Khan*, Qazi *Muhammad Zahur* and Babu *Surendra Nath Sen*, for the appellants.

Pandit *Bhagwan Din Dube*, for the respondents.

STANLEY, C. J., and BURKITT, J.:—The facts of this case are shortly as follows:—One Kazi Ahmad Husain who was the owner and in possession of the entire village of Yasinnagar and also of a 10 biswa share in the village of Khardauli and of some bighas of resumed *muafi* land in another village, died on the 2nd of August 1892, leaving his widow, the first defendant, and the defendants Husain Ahmad and Muhammad Ahmad, two sons, and the plaintiffs, his two daughters, him surviving. After his death in satisfaction of a decree obtained by one Gandharp Singh 5 biswas of Yasinnagar and 5 biswas of Khardauli and a third of the *muafi* land were foreclosed and possession delivered over to the judgment-creditor. Later on, namely, on the 18th of January 1899, a further share in the village of Yasinnagar was sold by the widow and two sons to the defendants 6, 7 and 8 and another party, the ancestor of the defendant 5. Again, under a sale-deed, dated the 25th of July 1901, a 5 biswa share in the village of Khardauli was transferred to the defendants 5 and 7. The suit out of which this appeal has arisen was instituted on the 12th of September 1904, by the plaintiffs as two of the heirs of Ahmad Husain to recover from the defendants 14 out of 48 *sihams* of the property which had passed into the hands of the judgment-creditor and transferees respectively under the decree and deeds of transfer to which we have referred.

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The Court of first instance decreed the plaintiff's claim and the lower appellate Court upheld the decision of the Court of first instance.

This appeal has been preferred on two grounds, the first being that the suit is bad for misjoinder of causes of action, and the second that an application made for mutation of names during the life-time of Kazi Ahmad Husain on the 28th of June 1892 was admissible in evidence, and clearly established that a gift of the whole village of Yasinnagar had been made by Kazi Ahmad Husain to his widow and two sons, and that therefore the plaintiffs had no interest in this village.

We shall first deal with the last question. In proof of the alleged gift the defendants adduced in evidence a petition which was filed by Ahmad Husain during his life. It runs as follows :—"I, Ahmad Husain, am zamindar of Yasinnagar, whole 20 biswas, and remain sick. So out of the said zamindari I have given 5 biswas to each of my sons and 10 biswas to my wife Barkat Fatima and have made over possession to them. I pray that mutation of names may take place." In addition to this petition two witnesses were examined to prove the alleged gift. The learned District Judge found after consideration of the evidence that Yasinnagar was not given as a gift to the plaintiffs' brothers and mother. It was contended before him that the petition for mutation of names to which we have referred really amounted to a deed of gift. This clearly was not so. It amounted at the most to evidence of a gift. The learned District Judge dealt with it apparently as evidence of a gift only. He says that "these mutations are often made for the sake of convenience and are no evidence of exclusive possession." Then dealing with the verbal gift which was set up by the appellants in his Court he observes :—"The evidence in support of it is unreliable. The two witnesses who deposed to the gift were a Hindu and a Muhammadan of low position. I refuse to put trust in their halting statements." Mr. *Agarwala* on behalf of the appellants before us argued that the learned District Judge was not justified in not giving full effect to the petition in question as amounting to satisfactory and conclusive evidence of the alleged gift. We think that this contention

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goes too far. The petition is no doubt evidence of a gift, but it is not conclusive evidence. The parol evidence which was given in support of the gift entirely broke down in the opinion of the District Judge, and he, coming to the conclusion that the evidence was not satisfactory, found that no gift in fact was proved. This is a finding of fact behind which we cannot go. The question is not one of law but one of fact. In the case of *Lachman Lal Chowdhri* v. *Kunhaya Lal Mowar* (1) their Lordships of the Privy Council dealt with a similar argument to that which has been presented to us. In that case it was contended that an adoption was proved by certain documents which were adduced in evidence and their Lordships say (at page 617):—"There are thus concurrent findings against the appellant on this question, which is a question of fact, and the determination of which depends on the evidence. It was argued for the appellant that as this evidence to an important extent consists of writings, the ordinary rule that this Board will not disturb the judgment of both Courts on facts does not apply. Their Lordships cannot accept this view. The question is not one of construction of one or more deeds, which would be a question of law, but is a question as to the effect to be given to decrees, leases and other documents as evidence of the fact of adoption and of its consequences." So here the question is not a question of construction of the petition relied upon, but it is a question as to the effect to be given to that petition as evidence of the fact sought to be proved by it, namely, whether or not a gift of the village in question was made by the deceased in his lifetime. We, therefore, hold that upon this ground of appeal we are concluded by the finding of fact of the lower appellate Court.

The next question is whether or not the claim of the plaintiffs is multifarious. Both the lower Courts have held that it was not so. The claim, it is to be observed, is for the recovery from parties in possession, said to be wrongfully, of the plaintiffs' shares of property of their father to which they lay claim as two of his heirs. The contention is that inasmuch as the property passed out of the hands of members of the family at different times under two transfers and a decree, suits ought to have been brought

(1) (1894) I. L. R., 22 Calc., 609, 22 I. A., 51.

against the defendants separately in respect of the property of which each had possession. We are of opinion that this contention is untenable. We have been referred to the case of *Ganeshi Lal* v. *Khairati Singh* (1) as an authority for the proposition. But in our opinion that case is clearly distinguishable from the present. We think that in this case the plaintiffs had one cause of action only, namely, the right on the death of their father to recover their shares of his property, and that that cause of action accrued to them upon their father's death. If the authorities on the question of multifariousness are conflicting, two decisions of the Calcutta High Court commend themselves to us: one is in the case of *Ishun Chunder Hazra* v. *Rameswar Mondol* (2); and the other in the case of *Nundo Kumar Nasker* v. *Banomali Gayan* (3). In the first of these cases it was held by O'Kinealy and Hill, JJ., that in a suit for ejectment against several defendants, who set up various titles to different parts of the land claimed, there is only one cause of action, not several distinct and separate causes of action. That was a suit by reversioners to recover the estate of one Brahmamayi Debi from several persons who were in possession of her property under different titles. The Court held that "the cause of action, namely, what the plaintiffs were bound to prove in order to succeed, was that they were the reversioners of Brahmamayi Debi in regard to this property and that the claim was not barred by limitation. The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one." In the other case, which was a suit brought by the plaintiff in ejectment, claiming under a lease, in which he made his landlord a defendant to the suit on the allegation that the plaintiff having obtained a lease of the land from the landlord, and having obtained possession, was forcibly dispossessed by the defendants in collusion with the landlord, the defence of the defendants mainly was that the suit was bad for multifariousness inasmuch as they were severally in possession of distinct and definite portions of the land, under different demises, and that there was no community of interest between them. In delivering their judgment

(1) (1894) I. L. R., 16 All., 279 (2) (1897) I. L. R., 24 Calc., 831.
(3) (1902) I. L. R., 29 Calc., 871

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Hill and Brett, JJ., say:—"The cause of action of a plaintiff suing in ejectment cannot, so far as we can perceive, be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. If this is so where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole, and not in fragments, and we think that all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to a suit in which he seeks to give effect to it." We agree with the learned Judges in this expression of their view of the law. We may also refer with approval to two decisions in this High Court in which the question of multifariousness was considered. The one is that of *Lachar Kuar* v. *Gur Prasad* (1) and the other the case of *Mazhar Ali Khan* v. *Sajjad Husain Khan* (2).

For these reasons the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1907
January 5

*Before Mr. Justice Richards**

EMPEROR v. RADHE LAL AND OTHERS.

Act (Local No. III of 1901 (United Provinces Land Revenue Act), sections 147, 227 and 228—Act No. XLV of 1860 (Indian Penal Code), section 353—Attachment—Power of Tahsildar to issue warrants of attachment for realization of revenue.

Held that a Tahsildar has no power under the United Provinces Land Revenue Act, 1901, to issue a warrant of attachment in order to realize arrears

* Criminal Revision No. 630 of 1906.

(1) (1888) I. L. R., 11 All., 33. (2) (1902) I. L. R., 24 All., 368.

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Government revenue, nor is a warrant issued by a Tahsildar validated by a general authority to that effect given to him by the Collector of the district.

In this case the tahsildar of a tahsil in the Gorakhpur district reported to the Collector that the inhabitants of a particular area within the limits of his tahsil were giving him trouble as regards the collection of land revenue, and asked for a general permission to issue warrants of attachment against them. The Collector granted the permission asked for, and the tahsildar accordingly issued certain warrants of attachment to a probationary tahsildar. When it was attempted to execute these warrants by seizure of property the tahsil peons were resisted by Radhe Lal and other persons, though no harm of any serious nature was caused to them. Radhe Lal and others were charged with the commission of offences under section 147 and section 353 of the Indian Penal Code and were convicted and sentenced to varying terms of imprisonment by a magistrate of the first class. They appealed against their convictions and sentences, but their appeals were dismissed by the officiating Sessions Judge, who confirmed the Magistrate's order. Radhe Lal and others then applied in revision to the High Court, their main plea being that the issue of a warrant of attachment by a tahsildar was illegal.

Mr. *A. H. C. Hamilton*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

RICHARDS, J.—This is an application for revision of an order, dated the 20th September 1906, of the Officiating Sessions Judge of Gorakhpur, confirming the order of Babu Ganga Prasad, a magistrate of the first class, sentencing the first three applicants to five months' under sections 147 and 353 of the Indian Penal Code and sentencing the last five of the applicants to three months' rigorous imprisonment each.

It would appear that the applicants had made default in the payment of Government revenue. Property was seized under what was alleged to be an attachment under the provisions of the Land Revenue Act of 1901. The applicants resisted the seizure of the property and hence the charge against them and their conviction.

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It is contended on behalf of the applicants that the attachment was illegal. Section 147 of the Land Revenue Act empowers the Collector to attach and sell the property of a person making default in payment of Government revenue. Section 227, sub-section 16, confers this power to attach and sell property upon an Assistant Collector of the first class in charge of a sub-division of a district. Section 228 confers a like power on an Assistant Collector of the first class although he is not in charge of a sub-division, but his power is limited to such cases or classes of cases as the Collector may from time to time refer to him for disposal. The Act in no case confers this power of attachment and sale on any other person. The attachment in the present case was not made by or under the authority of the Collector, or of the Assistant Collector in charge of a sub-division, or by an Assistant Collector to whom the case had been referred under the provisions of section 228. The attachment and sale was made by the tahsildar, who gave some kind of a warrant of authority to the probationary tahsildar. The only sanction for the action of the tahsildar was a general order which the Collector had endorsed on an application by the tahsildar dated the 24th May 1906.

This application or document commences with a kind of a report from the tahsildar to the Collector that the landholders are troublesome people who know the law and against whom it would be advisable to have a general order for attachment and sale. The endorsement by the Collector purports to grant a sanction to the general attachment in pursuance of the prayer of the application. In my judgment the attachment and sale of the property was illegal. It is quite clear that the Legislature conferred the power of sale and attachment only upon the Collector and Assistant Collector of the first class in manner already stated. The Collector and Assistant Collectors of the first class are bound to exercise themselves the power and discretion vested in them by law, and they have no right to delegate their authority to a tahsildar. The Board's Circular, Vol. I, Part III, relating to the recovery of arrears of land revenue under the Land Revenue Act of 1901, Rule No. 4, expressly provides that process under section 149 is only to be issued by or under the orders of the Collector or Assistant Collector in charge of the sub-division.

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EMPEROR v. RADHE LAL.

In my judgment the passing of a general order for all cases whether of a sub-division or particular villages or village is not a compliance with the Act or rules. It is stated that the practice adopted in this case is a general practice. If this is the case, the practice in my judgment ought to cease.

On the general merits of the case it would appear that the persons seizing the property were acting in good faith under colour of their office. The convictions might be sustained under sections 352 and 147 of the Indian Penal Code, if not under section 353. It is unnecessary, however, to alter the convictions in view of the order which I now intend to make. Being of opinion that the applicants have been sufficiently punished by the imprisonment they have already undergone, I direct that in the cases of those applicants whose terms of imprisonment have not yet expired, they be immediately released. In the cases of the other applicants I make no order. The record may be returned.

APPELLATE CIVIL.

1907

January 7

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

IMTIAZI BEGAM (JUDGMENT-DEBTOR) *v.* DHUMAN BEGAM (DECREE-HOLDER) AND BANDE ALI (AUCTION PURCHASER) *

Civil Procedure Code, sections 310A, 244 (c)—Execution of decree—Order refusing to accept a deposit tendered under section 310A—Appeal.

Held that an order refusing to accept a deposit tendered under the provisions of section 310A of the Code of Civil Procedure is an order falling within the purview of section 244 *(c)* of the Code and is appealable as such. *Gulzari Lal* v. *Madho Ram* (1) and *Phul Chand Ram* v. *Nursingh Pershad Misser* (2) referred to. *Bashir-ud-din* v. *Jhora Singh* (3) not followed.

IN this case Dhuman Begam in execution of a decree against Imtiazi Begam caused certain immovable property of the judgment-debtor to be sold. The sale was held on the 13th of September 1905, and the property was purchased by Bande Ali and Ali Husain. On the 2nd of November 1905, the day upon

* Second Appeal No. 377 of 1906 from a decree of H. W. Lyle, Esq., District Judge of Farrukhabad, dated the 3rd of January 1906, confirming a decree of Babu Gopal Das Mukerji, Munsif of Kaimganj, dated the 6th of December 1905.

(1) (1904) I. L. R., 26 All., 447. (2) (1899) I. L. R., 28 Calc., 73.
(3) (1896) I. L. R., 19 All., 140.

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IMTIAZI BEGAM v. DHUMAN BEGAM.

which the Civil Courts reopened after the Dashera vacation, the judgment-debtor made an application under section 310A of the Code of Civil Procedure to have the sale set aside; but did not deposit the necessary amount in the treasury until the 3rd of November. The Court of first instance (Munsif of Kaimganj) dismissed the application as barred by limitation. An appeal was preferred by the judgment-debtor to the District Judge of Farrukhabad who, however, held that no appeal lay. The judgment-debtor then appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

The respondents were not represented.

KNOX and RICHARDS, JJ.—The lower appellate Court, following the decision of this Court in *Bashir-ud-din* v. *Jhori Singh* (1), dismissed the appeal pending before it on the ground that no appeal lies from an order passed under section 310A of the Code of Civil Procedure, refusing to accept a deposit tendered under that section on the ground that it was too late. In the case cited this Court came to that conclusion in consequence of the view then taken "that a purchaser at an auction sale was not a representative, within the meaning of section 244 of the Code of Civil Procedure, of a party to the suit in execution of the decree in which the sale had taken place." Since then, however, this same question as to whether a purchaser at auction sale is or is not a representative, within the meaning of section 244, of a party to a suit, came up for decision before a Full Bench of this Court, and it was laid down in the case of *Gulzari Lal* v. *Madho Ram* (2) that an auction purchaser at a sale held in execution of a simple money-decree against a judgment-debtor whose property has been ordered to be sold at the suit of mortgagee in a mortgage suit is a representative of the judgment-debtor within the meaning of section 244(*c*) of the Code of Civil Procedure. The result of this is that the case of *Bashir-ud-din* v. *Jhori Singh* can no longer be cited as an authority, and an appeal does lie from an order passed under section 310A. The same view was taken by the Calcutta High Court in *Phul Chand Ram* v. *Nursingh Pershad Misser* (3). The appeal is decreed, the decree of the lower appellate Court is set aside, and the proceedings are

(1) (1886) I. L. R., 13 All., 140. (2) (1904) I. L. R., 26 All., 447.
(3) (1899) I. L. R., 28 Calc., 73.

remanded to that Court with instructions to that Court to readmit them on the file of pending appeals and dispose them of according to law. We make no order as to the costs of this appeal.

Appeal decreed and cause remanded.

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IMTIAZI BEGAM v. DEUMAN BEGAM.

REVISIONAL CIVIL.

1907 *January* 9

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

RAM NARAIN DUBE (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Regulation No. V of 1799, section 7—Escheat—Property taken charge of by District Judge—Period from which title vests in the Secretary of State.

Where property of a person dying intestate is taken charge of by a District Judge acting under section 7 of Regulation No. V of 1799, such property does not vest in the Secretary of State until the period prescribed by the Regulation has expired.

THE facts out of which this application arose are as follows. The District Judge of Benares purporting to act under the provisions of section 7 of Regulation No. V of 1799 took temporary custody of the property of one Musammat Janki, who had died within his jurisdiction, as was alleged, intestate. There was no immediate claimant to the property. Whilst the property of Musammat Janki was in the custody of the District Judge, one Ram Narain Dube instituted in the Court of Small Causes a suit against the Secretary of State seeking to recover certain arrears of house rent which he alleged to have been due to him by Musammat Janki. The Judge of the Court of Small Causes dismissed the suit on the finding that according to the provisions of Regulation V of 1799 the Secretary of State had not at the time the suit was brought become the owner of the property which had been of Musammat Janki in her life-time. The plaintiff then came to the High Court under section 25 of the Provincial Small Cause Courts Act.

Munshi *Gokul Prasad*, for the applicant.

Mr. *A. E. Ryves* for the opposite party.

KNOX and RICHARDS, JJ.—Ram Narain Dube, the petitioner in this case, brought a suit against the Secretary of State for India

* Civil Revision No. 27 of 1906.

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M. NARAIN DUBE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

in Council in the Court of the Judge of Small Causes at Benares. It appears that one Musammat Janki was the tenant of Ram Narain. Janki died intestate, so it is alleged, leaving personal property. No claimant to the property having come forward, the District Judge of Benares, under the authority vested in him by section 7 of Regulation V of 1799, took temporary care of the property. Janki was the tenant of Ram Narain Dube, and at the time she died was, according to Ram Narain Dube, in debt to him for certain arrears of house rent. It is for the recovery of this house rent that a suit was instituted in the Court of Small Causes. The suit was defended on the ground that the Secretary of State was not the owner of the property at the time the suit was brought and was not in possession of the property. The learned Judge held that until the period prescribed by the Regulation expired, the property did not vest in the Secretary of State and he could not be held liable for any debt. He accordingly dismissed the suit. In revision it is here contended that as under the Hindu Law upon the failure of heirs the property of a deceased person immediately escheats to the Crown, the Secretary of State must be taken to be in possession of the property. In our opinion the learned Judge is right, the liability of the Secretary of State does not arise until he has taken possession of the property. This date has not been reached. We do not understand why Ram Narain Dube did not as creditor apply to the District Judge for letters of administration. Had he done so, he could have paid out of the assets the debt due to himself and he would not have been obliged to wait for the expiry of the period prescribed for giving notice to the Secretary of State of his intention to sue. This application is dismissed with costs.

APPELLATE CIVIL.

1907
January 15.

Before Mr. Justice Sir George Knox and Mr Justice Richards.

SRI RAM AND OTHERS (DECREE-HOLDERS) v. HET RAM AND OTHERS (JUDGMENT-DEBTORS) *

Act No. XV of 1877 (Indian Limitation Act), section 7; schedule II, articles 178 and 179—Execution of decree—Limitation—Minority.

On the 11th of May 1886 a decree under section 88 of the Transfer of Property Act, 1882, was passed in favour of one *S L*. In June 1888 *S L* died leaving him surviving three sons, all minors. On the 30th of April 1889 these three sons, still minors, made an application for an order absolute under section 89 of the Act. Nothing further was done towards execution of the decree until the 1st of October 1904 when the three sons, one being still a minor, again applied for an order absolute for the sale of the mortgaged property. *Held* that the application of the 1st October 1904 was not barred by limitation. *Zamir Hasan* v *Sundar* (1) followed. *Bhagat Bihari Lal* v *Ram Nath* (2) and *Baldeo* v. *Ibn Haidar* (3) referred to by Richards, J.

In this case one Sukh Lal, on the 11th of May 1886, obtained a decree under section 88 of the Transfer of Property Act, 1882, against Het Ram and others. Sukh Lal the decree-holder died in June 1888 leaving him surviving three sons, who were at the time of their father's death all minors. On the 30th of April 1889 the sons, who were still all minors, made an application for execution of the decree obtained by their father, which in subsequent proceedings was taken to be (as stated in the judgment of Knox, J.) an application for an order absolute for sale. From that date no further proceedings were taken until the 1st of October 1904, when another application was made for an order absolute. At this date one at least of the three applicants was a minor. The Court of first instance (Munsif of Moradabad) held that the application of the 1st of October 1904 was barred by limitation and dismissed it, and the decree-holders' appeal from this order was likewise dismissed by the District Judge. The decree-holders thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru* and Pandit *Brij Narain Gurtu*, for the appellants.

* Second Appeal No. 654 of 1906 from a decree of W. F. Kirton, Esq., Additional District Judge of Moradabad, dated the 27th of April 1906, confirming a decree of Babu Bans Gopal, Munsif of Morad bad, dated the 6th of May 1905.

(1) (1899) I. L. R., 22 All., 199. (2) (1905) I. L. R., 27 All., 704.
(3) (1905) I. L. R., 27 All., 625.

1907

HARI RAM v. RAM RAM.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

KNOX, J.—This second appeal arises out of a decree granted under section 88 of the Transfer of Property Act, in favour of Sukh Lal, father of the present appellants, as against the judgment-debtors, who are respondents. The decree was given on the 11th of May 1886. Some time in June 1888 Sukh Lal died, leaving him surviving the three appellants, who were all minors at that time. On the 30th of April 1889 these three sons, still minors, made an application for execution. The file connected with these proceedings has been destroyed, but the parties and the Court have proceeded upon the assumption that it was an application for an order absolute, and it is difficult to see that it could have been for anything else. Since that date up to the 1st of October 1904 no further proceedings appear to have been taken by the decree-holders. Both the Courts below held that article 178 of the second schedule of the Indian Limitation Act governed the present application, and further that as time had begun to run in the life-time of Sukh Lal, the application out of which this appeal has arisen was time barred. In appeal before us it is contended that even assuming that time had began to run during the lifetime of the appellant's father, the steps taken in 1889 saved the decree from becoming time barred. Our attention was called to the Full Bench ruling in *Zamir Husan* v. *Sundar* (1) in support of this plea. The learned vakil for the respondent addressed a very able argument to us in which he tried to distinguish the present case from the Full Bench ruling just quoted. He pointed out that the right to apply accrued on the 11th of November 1886, and time began to run within three years as prescribed by article 178 of the Limitation Act. It is true, he argued, that the sons of Sukh Lal did apply for an order absolute, but after that they took no further steps. Article 178 was the article which governed limitation for an order absolute, and as time had begun to run against Sukh Lal, subsequent disability of minority would be no stop. It would appear to me that the application made on the 30th of April 1889 being, as this Court has frequently held, a step in aid of execution, time began to run, if I may use the expression, "anew"

(1) (1899) I. L. R., 22 All., 199.

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SRI RAM v. HET RAM.

from that date. At that date all the present appellants, who were then minors, were entitled to make the present application. The youngest Ram Ratan is still a minor and can sue up to a period within three years after his disability has ceased. That time has not yet arrived.

RICHARDS, J.—In my judgment this appeal is concluded by the decision of the Full Bench in the case of *Zamir Hasan* v. *Sundar*. In that case a decree had been made in favour of two decree-holders. The decree was for sale upon a mortgage, which was subsequently made absolute, and then one of the decree-holders died. An application for execution was made by the widow of one of the deceased decree-holders, and the Full Bench held that this application saved limitation and enabled the minor children of the deceased decree-holders to take advantage of section 7 of the Limitation Act after they attained majority. In the present case the decree was made in favour of Sukh Lal. What must be taken as an application to make the decree absolute was made in 1889 by the sons of Sukh Lal, and this application was within time. It seems to me that the present case is on all fours with the decision of the Full Bench. It is said that there is some apparent conflict between the Full Bench decision and the decision of this Court to which I myself was a party, namely *Bhagat Bihari Lal* v. *Ram Nath* (1). In that case a decree having been made in favour of one Baijnath, the decree was made absolute on the 21st of March 1896. On December 11th, 1897, Baijnath died leaving the respondent Ram Nath, a minor, as his heir. The Court held that as time had begun to run in the lifetime of Baijnath, the respondent could not take advantage of section 7 of the Limitation Act. It is only necessary to point out that in that case there was not, as there is in the present case, and as there was in the Full Bench case, an application within time. This application, as has been already pointed out in the judgment of my learned brother, is an application which is a step in aid of execution. It was decided in the case of *Baldeo* v. *Ibn Haidar* (2) that although the first application to make absolute an order for sale under section 89 of the Transfer of Property Act is regulated by article 178, that application is nevertheless a step in aid of execution, and

(1) (1905) I. L. R., 27 All., 704. (2) (1899) I. L. R., 27 All., 625.

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SEE RAM v. HEE RAM.

that subsequent applications will be regulated by article 179, clause (4) of the second schedule of the Limitation Act, and not by article 178. For these reasons I concur with the judgment just delivered that the present appeal must succeed.

BY THE COURT.—The appeal is decreed and the decrees of both the Courts below are set aside and these proceedings are remanded to the Court of first instance, through the lower appellate Court, under section 562 of the Code of Civil Procedure with directions that the Court of first instance readmit them on the file of pending proceedings and dispose of them according to law. We make no order as to the costs of this appeal or the costs hitherto.

Appeal decreed and cause remanded.

APPELLATE CRIMINAL.

1907

January 16.

Before Mr. Justice Banerji and Mr. Justice Aikman.

EMPEROR v. BHOLA SINGH AND ANOTHER.*

Act No. XLV of 1860 (Indian Penal Code), sections 304 and 325—Assault by three persons armed with lathis—Intention—Culpable homicide—Grievous hurt.

Three persons attacked a fourth with lathis, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt which of the three assailants struck that blow.

Held that the offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder. *Queen Empress* v. *Duma Baidya* (1) followed.

THE facts out of which this case arose were as follows:—In execution of a decree of the Small Cause Court against Bhola Singh and his son Jauhari, the decree-holder Banke Lal went to attach their property. He was accompanied by the Civil Court bailiff and his chaprasi, Ganeshi Lal his own servant, one Ram Chand a neighbour, and others. When these persons were seen approaching, the accused untied their cattle and drove them off to the jungle. One buffalo was seized, and Ganeshi Lal and Ram Chand went in search of the rest of the cattle. Bhola Singh and Jauhari, and another son Khem Sahai who absconded

* Criminal Appeal No. 1020 of 1906.

(1) (1896) I. L. R., 19 Mad., 483.

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EMPEROR v. BHOLA SINGH.

subsequently, went after them and attacked them with lathis. Ganeshi Lal received from one of the three a lathi blow on the head which fractured his skull and killed him, the witnesses, however, though they saw the three men hitting Ganeshi Lal with lathis, were too far off to be able to say which one of them struck him on the head. Bhola Singh and Jauhari were convicted by the Sessions Judge of Agra and sentenced to transportation for life under section 304 of the Indian Penal Code. They appealed to the High Court.

Babu *J. N. Mukerji*, for the appellants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BANERJI and AIKMAN, JJ.—This is an appeal by Bhola Singh and his son Jauhari against their conviction under section 304 of the Indian Penal Code and the sentence of transportation for life passed on each of them. It appears that a Civil Court Amin went to attach the cattle of the accused in execution of a decree of a Court of Small Causes. He was accompanied, among others, by one Ganeshi Lal, a servant of the decree-holder. When the Amin's party was seen approaching, the accused untied their cattle and drove them off to the jungle. One buffalo was seized, and Ganeshi Lal and another man, Ram Charan, went in pursuit of the other cattle. The appellants and Khem Sahai, another son of Bhola Singh, who has absconded, went after them and attacked them with lathis. Ganeshi Lal received a blow on the head which fractured his skull, and also injuries on the right side of the chest. As a result of the blow on the head he died shortly afterwards. These facts are fully proved by the witnesses for the prosecution. None of them, however, is able to say whose blow caused the fracture of the skull which resulted in Ganeshi Lal's death. The question therefore is whether on the evidence the two appellants can be convicted of causing the death of Ganeshi Lal. As it has not been proved that the appellants or either of them struck the fatal blow, and as there is nothing to show that there was a common intention on the part of all the three assailants to inflict such injury as was likely to cause death, we are of opinion that the appellants cannot be convicted of the offence punishable under section 304 of the

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EMPEROR v. BHOLA SINGH.

Indian Penal Code. In the absence of evidence to show that there was a common intention to cause death or such injury as was likely to cause death we think that section 34 of the Indian Penal Code would not apply. Our view is supported by the ruling in *Queen-Empress* v. *Dama Bardya* (1). In that case three persons assailed the deceased and gave him a beating in the course of which one of the prisoners struck the deceased a blow on the head which resulted in his death. All three were convicted of causing the death of the deceased, and were sentenced to transportation for life. In appeal the learned Judges, whilst sustaining the conviction of the accused who had struck the fatal blow, held that in the absence of proof that all the prisoners had a common intention to inflict injury likely to cause death, the other accused could not be convicted of murder. We have now to consider of what offence the appellants should be convicted. We think that, having regard to the fact that lathis were used by all the three assailants, and that the probable result of the use of lathis was at least grievous hurt, the common intention of the assailants may be deemed to have been to cause grievous hurt. We are therefore of opinion that all of them must be held to be guilty of causing grievous hurt. We so far allow the appeal as to set aside the conviction under section 304 and the sentence of transportation for life, and, convicting the appellants under section 325 of the Indian Penal Code, sentence each of them to rigorous imprisonment for five years with effect from the 4th of October 1906.

1907
January 16.

APPELLATE CIVIL.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

KANHAYA LAL AND OTHERS (DEFENDANTS), *v.* SARDAR SINGH (PLAINTIFF).*

Act No. III of 1877 *(Indian Registration Act), sections* 76 *and* 77*—Registration—Suit to compel registration—Grounds of such suit.*

Where a Registrar refused to register a document presented to him upon the grounds that there was not sufficient proof that the document was executed by the authority of the alleged executant and that there was undue and unexplained delay in presenting the document for registration, it was *held* that a

* First Appeal No. 65 of 1906 from an order of Babu Jaga Nath, Subordinate Judge of Farrukhabad, dated the 12th of April 1906.

(1) (1896) I. L. R., 19 Mad., 483

suit would lie under section 77 of the Indian Registration Act, 1877, to compel registration.

Held also that in a suit under section 77 of the Registration Act the Court is only concerned with the genuineness of the document sought to be registered and not with its validity.

Kudrathi Begum v. *Nasib-un-nissa* (1) and *Raj Lakhi Ghose* v. *Debendra Chundra Mojumdar* (2) referred to.

The facts of this case are as follows:—

The plaintiff applied to the Sub-Registrar of Kanauj for the registration of a deed of mortgage alleged to have been executed by one Musammat Sundar on the 20th of August 1904. Before, however, registration was obtained Musammat Sundar died; her heirs refused to appear before the Sub-Registrar, and in consequence the plaintiff's application was struck off on the 17th June 1905. The plaintiff then applied to the District Registrar of Fatehgarh; but his application was rejected on the grounds (1) that the execution of the deed was not proved, and (2) that no satisfactory explanation was given for the long delay (nearly eight months) of the plaintiff in applying for registration. The plaintiff then brought the present suit under section 77 of the Registration Act, 1877, asking for a decree to compel registration of the mortgage deed. The Court of first instance (Munsif of Kanauj) held that the suit would lie, but dismissed it upon the ground that the mukhtarnama in virtue of which the mortgage deed was executed in behalf of Musammat Sundar was not shown to have been explained to the executant and therefore could not bind her. On appeal by the plaintiff the lower appellate Court (Subordinate Judge of Farrukhabad) held that the question of the validity of the deed was not a matter to be considered with reference to registration, but only its genuineness, and accordingly remanded the case to the Court of the Munsif under section 562 of the Code of Civil Procedure for disposal on the merits. Against this order of remand the defendants appealed to the High Court.

Maulvi *Ghulam Mujtaba*, and Munshi *Gulzari Lal* for the appellants.

Dr. *Tej Bahadur Sapru*, for the respondent.

KNOX and RICHARDS, JJ.—This was a suit under section 77 of the Registration Act. It appears that an application was

(1) (1897) I. L. R., 25 Calc., 93. (2) (1897) I. L. R. 24 Calc., 668.

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KANHAYA LAL v. SARDAR SINGH.

made for the registration of a deed, dated the 22nd of August 1904, which purported to be executed on behalf of one Musammat Sundar, by one Makhan Lal as her mukhtar-am, in favour of one Sardar Singh, plaintiff in this suit. The document was not presented for registration within the four months prescribed by the Act. The document was in fact presented for registration on the 15th of April 1905, at which date Musammat Sundar was dead. The appellant, however, does not in any way support the appeal by reason of the fact of the death of Musammat Sundar before the deed was presented for registration. The Registrar refused to register the document, first on the ground that there was no proof that the deed was in fact the deed of Musammat Sundar, and, secondly, that the delay in presenting the deed for registration had not been sufficiently explained. The present suit was then brought under section 77 of the Registration Act. The appellant contends, first, that the suit cannot be maintained. This contention is based on the fact that there was no refusal by the Registrar to order the document to be registered under section 76, and that section 77 limits the power to bring suits in the Civil Court to orders of the Registrar refusing to order documents to be registered under sections 72 and 76. Section 76, clause (*a*), is as follows:—"Every Registrar refusing (*a*) to register a document except on the ground that the property to which it relates is not situate within his district or that the document ought to be registered in the office of the Sub-Registrar," omitting clause (*b*), "shall make an order of refusal, etc." Section 77 then provides for a suit where the Registrar refuses to order the document to be registered. It is quite clear that some word or words has or have been accidentally omitted immediately after the words "district or" in section 76, clause (*a*), and that the clause should read:—"Every Registrar refusing to register a document except on the ground that the property to which it relates is not situate within his district, or *to order* that the document ought to be registered, etc." In the present case the Registrar did refuse *to order* that the document should be registered, and in our opinion he did in fact refuse under the provisions of section 76 to order the document to be registered and accordingly the suit was maintainable in the Civil Court. The view we take is

supported by the ruling in *Kudrathi Begum* v. *Najib-un-nessa* (1).

The second point urged was that, inasmuch as the deed was not executed by Musammat Sundar, it was necessary not only to ascertain whether or not she had given the mukhtarnama to Makhan Lal, but also to ascertain whether or not she as a pardanashin lady had understood the contents of the mukhtarnama and had the same explained to her before she executed it. Neither in the Court of first instance nor in the grounds of appeal has any point been taken as to the evidence by which the execution of the mukhtarnama was proved. The mukhtarnama was duly registered and a certificate of its registration was given in evidence, but it was not proved that the mukhtarnama was fully explained and understood by Musammat Sundar. In our judgment this was not a matter which the Registrar or the Civil Court in a suit brought under the provisions of section 77 of the Registration Act should take into consideration. The Registrar and the Court in such a suit ought to concern themselves with the genuineness of the deed and not its validity. This view is supported by the decision of the Calcutta High Court in the case of *Raj Lakhi Ghose* v. *Debendra Chundra Mojumdar* (2). Accordingly the second ground of appeal also fails and we dismiss the appeal with costs.

Appeal dismissed.

1907
January 17

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

KAMTA SINGH (PLAINTIFF) *v.* MUKHTA PRASAD AND ANOTHER (DEFENDANTS).*

Lambardar and co-sharer—Suit for profits—Nature of liability of two lambardars for the same village—Res judicata.

Where there are two lambardars for the same village, they may, as a matter of convenience, elect to divide the village between them for purposes of collection, but such division will be purely a matter of convenience and will not affect the joint liability of the lambardars to the co-sharers.

A co-sharer sued the two lambardars jointly for profits, and the Court (an Assistant Collector) held that they were not liable to be sued jointly and

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*Appeal No. 75 of 1906 under section 10 of the Letters Patent.

(1) (1897) I. L. R., 25 Calc., 93. (2) (1897) I. L. R., 24 Calc., 668.

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KANTA SINGH v. MUKTA PRASAD.

dismissed the suit. The plaintiff did not appeal, but filed separate suits. *Held* that this decision did not amount to a *res judicata* as to the lambardars' joint or separate liability in a subsequent suit by the same co-sharer against them for profits of other years.

THIS appeal arose out of a suit brought by a co-sharer against two lambardars jointly for profits of his share in the village. The defence was that, inasmuch as the two lambardars collected separately each for his own 10 biswas of the village, a joint suit was not maintainable, and further that this question was *res judicata*. The plea of *res judicata* was based on the following facts. On a former occasion the plaintiff had brought a similar suit for profits against the same two lambardars jointly. In that suit it had been decided by an Assistant Collector that a suit against the lambardars jointly was not maintainable; and the plaintiff, instead of appealing against it, had acquiesced in this decision and filed separate suits. The Court of first instance (an Assistant Collector) dismissed the suit upon the ground of *res judicata* and this decision was affirmed by the Officiating District Judge in appeal. The plaintiff then appealed to the High Court, and his appeal coming before a single Judge of the Court was dismissed upon the same ground. The plaintiff thereupon filed this present appeal under section 10 of the Letters Patent of the Court.

Babu *Lakshmi Narain*, for the appellant.

Babu *Parbati Charan Chatterji* and Pandit *Baldeo Ram Dave*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal from a decision of a learned Judge of this Court affirming the decision of the District Judge, which upheld the decree of an Assistant Collector of Etawah. The suit is one by the plaintiff, a co-sharer in the village, to recover his share of the profits of the village from the two lambardars, Mukhta Prasad and Musammat Mohan Kunwar, for the years 1309 to 1310 fasli. The plaintiff owns about $\frac{1}{12}$th of the village and is entitled to that proportion of the profits of the village. The defence set up was that the plaintiff was wrong in suing both the defendants jointly, and that he should have sued each one of them separately for the amount of the profits which might have been collected respectively by each.

Now as to that matter our learned brother remarks :—"I would have thought that the office of lambardar, even though exercised by several persons, was a joint office and that the fact that each made separate collections was a mere matter of convenience between themselves." In this view of the law we entirely concur. When these two defendants were appointed lambardars, they were appointed jointly as lambardars responsible to Government for the payment of the revenue of the joint mahal and responsible jointly to the co-sharers for their shares of its profits. The fact that these two lambardars for convenience sake may have divided the village amongst themselves and one of them may have collected profits in one portion and the other in another portion is a matter with which the other co-sharers have no concern. It is a matter of private arrangement made by the lambardars for their own convenience. It is an arrangement which may be retained or altered from year to year if the lambardars so chose, but it does not compel any one co-sharer to look to any one lambardar as the person responsible to him for his share of the profits.

Great reliance is placed on a question of *res judicata* which arises out of a decision by an Assistant Collector of the first class in a previous suit. That suit was by the same plaintiff against the same defendants. The latter pleaded that they were not liable to be sued jointly and the Court of the Assistant Collector held that that plea was correct and dismissed the suit. The plaintiff did not appeal, but instituted two separate suits. It is contended that the decision of this case is *res judicata* and governs the present case. In that argument we are unable to concur. What was then decided in that case was that the two lambardars were not jointly responsible to the plaintiff for his share of the profits of the year then in suit by reason of the arrangement between the defendants. The present suit has nothing whatever to do with the profits that were in suit then. For all we know the arrangement between the lambardars may have changed completely; but as a matter of law the defendants are jointly responsible to the plaintiff for his share of the undivided profits of the mahal. It is futile for the defendants—and specially the defendant Mukhta Prasad—to say to the plaintiff:—"I have collected a very small

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share of your profits; therefore you should not sue me jointly with the other defendant; you must sue both separately." That, we think, is not the correct view of the law in view of the joint responsibility of the respondents. This suit has been dismissed in all the lower Courts on the ground that the decision of the Assistant Collector, to which we have just referred, operates as a *res judicata*. In our opinion that conclusion is wrong. We must therefore allow this appeal, set aside the judgment of all the lower Courts as also of the learned Judge of this Court, and as the suit was decided in the Court of first instance on the preliminary point that it was not maintainable against the two defendants, we remand the record through the lower appellate Court to the Court of first instance under section 562 of the Code of Civil Procedure to be replaced on the file of pending cases and tried on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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January 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

DAMMAR SINGH AND ANOTHER (PLAINTIFFS) *v.* PIRBHU SINGH AND ANOTHER (DEFENDANTS) *

Civil Procedure Code, section 443—Guardian ad litem—Appointment of guardian ad litem other than the certificated guardian.

Held that the appointment, apparently by an oversight, as guardian *ad litem* to a minor defendant of a person other than the certificated guardian amounted to no more than an irregularity and would not of itself vitiate either a decree passed in a suit or a sale consequent upon such decree.

THE facts of this case are as follows. Pirbhu Singh and another sued Dammar Singh and another who were minors, and had their mother Rukhmina Kunwar appointed guardian *ad litem*. This was done apparently in ignorance of the fact that one Jhunni Singh had been appointed certificated guardian of the minor defendants. In the suit so brought the plaintiffs obtained a decree and some property of the minors was brought to sale. The defendants then brought the present suit asking for a declaration that the decree and sale in the former suit were void on the ground that they had not been properly represented. The Court of first

* Second Appeal No. 1214 of 1905 from a decree of Babu Madho Das, Subordinate Judge of Shahjahanpur, dated the 6th of September 1905, confirming a decree of Babu Koshab Das, Munsif of Sahaswan, dated the 29th of April 1905.

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istance (Munsif of Shahjahanpur) decreed the suit in part and ismissed it in part. Both sides appealed. On appeal the lower ppellate Court (Subordinate Judge of Shahjahanpur) dismissed he plaintiffs' suit altogether. The plaintiffs thereupon appealed o the High Court.

Babu *Jogindro Nath Chaudhri* for the appellants.

Maulvi *Muhammad Ishaq* for the respondents.

STANLEY, C.J., and BURKITT, J.—We think that the view expressed by the learned Subordinate Judge is correct. There is no doubt that in appointing the mother of the minors as their guardian *ad litem* when there was already a certificated guardian, the Court acted in violation of the provisions of section 443 of the Code of Civil Procedure. That section provides that where an authority competent to appoint a guardian was appointed or declared a guardian or guardians of the person or property or both of the minor, the Court shall appoint him guardian *ad litem*, unless it considers for reasons to be recorded by it that some other person ought to be so appointed. It does not appear in this case that the Court did consider that any person other than the certificated guardian ought to be appointed, for it is admitted that no reasons for the appointment of the mother as guardian were given in the order passed by the Court appointing her. In fact it would seem that the Court was ignorant of the fact that Jhunni Singh had already been appointed a certificated guardian. It is contended before us that the appointment of the mother was illegal, and that in consequence of this illegality the decree passed in the suit and the sale consequent upon the decree are nullities. We are not aware of any authority for such a proposition. We are disposed in the absence of authority to hold that the violation of the provisions of section 443 by the Court is merely an irregularity and, as such, does not of itself vitiate either a decree passed in a suit or a sale consequent upon such decree. For these reasons we concur in the finding of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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January 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

DAMBAR SINGH AND ANOTHER (PLAINTIFFS), *v.* JAWITRI KUNWAR (DEFENDANT).*

Act No. IV of 1882 (Transfer of Property Act), section 41—Transfer by ostensible owner—Owners of property transferred, minors—Guardian incapable of consenting to apparent ownership of transferor.

Held that the guardian of a minor owner of immovable property is incapable of consenting, even though such consent be express, to a third person holding himself out as owner of the minor's property, so as to enable a transferee from such person to claim the benefit of section 41 of the Transfer of Property Act, 1882.

THE facts of this case are briefly as follows:—The plaintiffs Dambar Singh and Shib Sahai Singh were entitled by right of their father Jai Singh to certain immovable property. Whilst these plaintiffs were minors under the guardianship of their mother Rukmin Kunwar, one Beni Singh the plaintiffs' half-brother acted as *sarbarahkar* of his step-mother Rukmin Kunwar. In this capacity Beni Singh sold to Jawitri Kunwar, who was his wife, certain property which was really the property of the minors. On attaining majority the plaintiffs sued to recover from Jawitri Kunwar the property so sold to her by Beni Singh. The Court of first instance, treating the transaction as a sale by an ostensible owner within the meaning of section 41 of the Transfer of Property Act gave the plaintiffs a decree conditional upon their repaying to the defendant the sale consideration amounting to Rs. 6,000. Against this decree the plaintiffs appealed to the High Court.

Mr. *B. E. O'Conor*, Babu *Jogindro Nath Chaudhri* and Dr. *Tej Bahadur Sapru*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen, is closely connected with First Appeal No. 231 of 1904, in which we have delivered judgment to-day. In that case it will be remembered that one Beni Singh and his father, Jai Singh, had some litigation which eventually ended in a partition suit, by which Beni Singh took one-half of the property and his father, Jai Singh, remained in possession of the

* First Appeal No. 233 of 1904, from a decree of Pandit Girraj Kishore Datt, Subordinate Judge of Moradabad, dated the 11th of August 1904.

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mainder. Beni Singh's wife was one Jawitri Kunwar. This it is to recover possession of certain villages which were conveyed by Beni Singh to Musammat Jawitri Kunwar by a sale-deed of the 22nd of January 1886. It is contended that Beni Singh had no title whatever to make that conveyance. This point was not raised in the Court below. Most of the villages conveyed by that sale-deed came to Jai Singh after the partition between him and his son, Beni, on the successive deaths of two widows, Musammat Tulsha and Musammat Khushalo in 1881 and 1883. On their deaths the properties of their husbands, Sher Singh and Dhuma Singh, came to Jai Singh by collateral succession. It is shown that Beni Singh for some time acted as *sarbarahkar* of his step-mother, Musammat Rukmin Kunwar—from the death of Jai Singh in 1885 down to the year 1887. In the latter year Rukmin Kunwar was appointed guardian of the person and property of her minor sons. It was during this period (1885 to 1887), while Beni Singh was acting as *sarbarahkar*, that he executed the transfer to his wife, Musammat Jawitri Kunwar, after having had his name recorded in respect of those villages on his father's death. The transfer purports to have been made in consideration of a sum of Rs. 6,000, which Beni Singh acknowledges to have received from his wife. The plaintiffs appellants, who are the sons of Jai Singh by his wife Musammat Rukmin Kunwar, claimed possession of these villages as part of their father's estate. The Subordinate Judge gave them a decree for possession, but on condition that they should repay to Musammat Jawitri Kunwar the sum of Rs. 6,000, which was said to have been paid by her to her husband as consideration for the sale. The reason which the Subordinate Judge gives for the orders is because it was purchased by Musammat Jawitri Kunwar "in good faith, in lieu of Rs. 6,000 at a time when Beni Singh was the ostensible owner of the property with the implied consent of Musammat Rukmin Kunwar, the mother and guardian of the person and property of the plaintiffs, and Musammat Jawitri Kunwar, a *pardanashin* lady, had acted in good faith after taking reasonable care to ascertain, so far as she could that, Beni Singh had power to transfer the said property to her." We find it difficult to understand exactly the reasons

given by the Subordinate Judge for refusing to give other than a conditional decree Presumably this order is passed under the provisions of section 41 of the Transfer of Property Act, that section lays down as follows :—"Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, &c., &c." Now the first point to notice in this case is that the consent, express or implied, which is to be given must be that of the persons interested. Who were the persons interested in the villages which form the subject of the deed of conveyance? They were, undoubtedly, the two plaintiffs appellants. They were the only persons who could give such a consent, whether implied or express. But at the time when this transaction took place they were infants of tender years who could not possibly give such consent. Then the learned Subordinate Judge says :—"With the consent of the mother and guardian Musammat Rukmin Kunwar." But Musammat Rukmin Kunwar was not a person personally interested in the property, and we are unable to say that the consent, even if express, given by a guardian to a third party to hold himself out to the world as the owner of the infant's property, would be such a consent as is required by section 41 of the Transfer of Property Act. To hold so would be to open a wide door to fraud. We note the fact that it is admitted on both sides that there is no shred of evidence that consent was given by Musammat Rukmin Kunwar. We would also point out that at the date of the conveyance by Beni to the respondent, Musammat Rukmin Kunwar was not the guardian of the property of her children. For the above reason we are of opinion that the lower Court acted wrongly in imposing in its decree a direction that the appellants should first of all pay Rs. 6,000 to Musammat Jawitri.

Mr. *O'Conor*, for the appellants, also complains that the lower Court has given mesne profits only from the date of the decree and not from the date of the institution of the suit. We think that as a matter of course on getting a decree for the recovery of mesne profits a successful plaintiff is entitled to mesne profits at least from the date of the institution of the suit. We therefore modify the decree to this extent. For the above reasons we allow

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is appeal, and we give the plaintiffs appellants a decree for possession of the property in suit unrestricted by the burden of paying Rs. 6,000 to Musammat Jawitri Kunwar, and we give mesne profits from the date of the institution of the suit. The appellants are entitled to their full costs in both Courts.

We may mention that several objections were filed in this Court after the presentation of the appeal under the provisions of section 561 of the Code of Civil Procedure. According to law, those objections should have been filed within one month from the date of the service of summons on the respondent. Now here it has been shown that the summonses were served on the 5th of December 1904, and these objections were not filed until the 9th of January 1905, that is to say, they were four days late. They should have been filed on the 5th of January at the latest. An attempt has been made to explain this delay by saying that the respondent was away from the village when the summons was served. An affidavit has been put in to support this excuse for the delay. To that affidavit we give very little credit. We cannot understand how the person who swore to its truthfulness, who is the agent of Musammat Jawitri, did not, if his story be true, at once inform her of the service. Further we have before us the affidavit of the process-server who swears that Musammat Jawitri was at the time in her house, that he could not obtain access to her, and he was obliged to affix the summons on the door of the house. We refuse to entertain the objections and reject them with costs.

Appeal decreed.

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January 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

GOBIND RAM (PLAINTIFF) *v.* MASIH-ULLAH KHAN AND OTHERS (DEFENDANTS.) *

Pre-emption—Wajib-ul-arz—Custom—Effect of perfect partition, no new wajib-ul-arzes for the new mahals being framed.

Where a village, in which, according to the wajib-ul-arz, a custom of pre-emption existed amongst the co-sharers, was divided by perfect partition into three mahals, but no fresh wajib-ul-arzes were framed for the new mahals, it was *held* that the custom was either abrogated in its entirety, or remained

* First Appeal No. 72 of 1905 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 20th of December 1904.

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applicable in its entirety to the co-sharers in the various new mahals *inter se*. *Badri Prasad* v. *Hasmat Ali* (1) discussed. *Dalganjan Singh* v. *Kalka Singh* (2) referred to.

THIS was a suit for pre-emption based upon custom as recorded in the wajib-ul-arz of a village named Kiyampur Bheria in the Etah District. The terms of the wajib-ul-arz were as follows :—"If any co-sharer wishes to transfer his share by mortgage or sale, he shall do so first to the co-sharers of the village, and if any stranger causes the price of the share to be entered in the document in excess of the real price in order to deprive the co-sharers of the village of their right, the proper price shall be determined by arbitration or by the officer for the time being." After the framing of this wajib-ul-arz, the village, originally one, was divided by perfect partition into three mahals of 10, 5 and 5 biswas, but no fresh wajib-ul-arzes were framed for the new mahals. Then the owner of a share in the 10 biswa mahal sold his share to the owners of one of the 5 biswas mahals, and the owner of another share in the 10 biswa mahal brought the present suit for pre-emption. The Court of first instance (Subordinate Judge of Aligarh) dismissed the suit, being of opinion that the village had been divided into four mahals, and not three, and that the pre-emptor was not therefore a co-sharer in the mahal to which the property sold belonged, and was in no better position than the vendee as regards the right of pre-emption. The plaintiff appealed to the High Court, contending that, inasmuch as he was a co-sharer in the mahal in which the property sold was situated, he had a claim to pre-empt superior to that of the vendee whose property was in a different mahal.

Babu *Kedar Nath* and Babu *Lakshmi Narain*, for the appellant.

Pandit *Moti Lal Nehru* and Qazi *Muhammad Zahur*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The question involved in this appeal is concerned with the effect upon a custom of pre-emption prevailing in a village of a perfect partition of the village. In the village of Kiyampur Bheria, situate in the district of Etah, the following right of pre-emption arising by custom prevailed was recorded in the wajib-ul-arz, namely :—"If any share-holder

(1) Infra, p. 299. (2) (1899) I. L. R., 22 All., 1.

wishes to transfer his share by mortgage or sale, he shall do so first to the co-sharers of the village, and if any stranger causes the price of the share to be entered in the document in excess of the real price in order to deprive the co-sharers of the village of their right, the proper price shall be determined by arbitration, or by the officer for the time being." The village at the time of this wajib-ul-arz consisted of one undivided mahal, but it was, before the sale which has given rise to this litigation, divided by perfect partition into three mahals. The plaintiff Gobind Ram is the owner of 5 biswas of one of these mahals, and the share which is the subject matter of the suit is the remaining 5 biswas of that mahal, which belonged to the defendant Lachmi Narain. The vendees are Masi-ullah Khan and Zamir-ul-Hasan Khan, who purchased his share from Lachmi Naram. No new wajib-ul-arzes were framed at the time of partition. The learned Subordinate Judge, wrongly, we think, held that the village was divided into four mahals, and that neither the plaintiff nor the vendees were co-sharers in the mahal which was the subject matter of the sale, and that therefore the plaintiff and the defendant vendees stood on the same footing as regards pre-emption, and on this ground he dismissed the plaintiff's suit.

It appears to us clear from the khewat that the village was divided into three mahals only, namely, mahal Rafat Khan, consisting of 5 biswas, mahal Masih-ullah Khan, consisting of 5 biswas, and mahal Chamsukh of 10 biswas. This appears from the closing khewats for the years 1302 and 1305 fash which have been proved. The mistake of the learned Subordinate Judge arose from the fact that in the khewat of the 10 biswas mahal Hafiz Muhammad Rafat Khan is described as the mortgagee of the share consisting of 5 biswas of Lachmi Narain, while Musammat Ratan Kunwar is described as the owner of the remaining 5 biswas. This fact by no means establishes that the mahal of 10 biswas formed two mahals. The learned advocate for the respondents admitted this, and was not able to support the view of the Court below. On the ground therefore on which the Court below dismissed the plaintiff's claim the decree cannot be supported. But the learned advocate for the respondent contended that as the vendees were co-sharers in the village before the partition, they

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have the same pre-emptive rights in respect of every part of the village as the plaintiffs.

This raises the important question what is the effect of the perfect partition of a village upon a right existing by custom under which each co-sharer in the village was entitled to pre-empt the sale to a stranger of any portion of the village. Mr. *Kedar Nath* on behalf of the appellant contended that in a case such as the present, upon perfect partition of a village into mahals, only the co-sharers in the mahal, portion of which is sold to a stranger, can pre-empt the sale, and that co-sharers in other mahals have no right of pre-emption whatever.

If this view be correct, the effect of perfect partition is undoubtedly to modify the custom of pre-emption as it previously existed. The custom is no longer a custom whereby any co-sharer in the village is entitled to pre-empt the sale of any portion of the village area, but is split up into customs which restrict the right of pre-emption to the co-sharers in the limited area of the village portion whereof has been sold to a stranger. It appears to us that this cannot be; we think that the custom which previously prevailed must be treated either as subsisting in its entirety or else as having been abrogated by perfect partition; that if the custom exist at all after partition it must be the old custom and not modifications of the old custom. If the effect of partition is to abrogate the custom entirely, then *cadit quæstio*. If on the other hand it continues to exist after partition, it cannot, we think, do so in a modified form. A custom must be not merely ancient, but it must be continuous, uninterrupted, uniform, certain and definite. As Sir Arthur Strachey, C.J., in the case of *Dalganjan Singh* v. *Kalka Singh* (1) said in dealing with the record of a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition:—"It cannot be something absolutely new, or the word custom would be a misnomer. It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition, and which is recognised as still applicable within the new mahal."

(1) (1899) I. L. R., 22 All., 1.

We are unable to accept the view expressed by the learned Judges who decided the case of *Badri Prasad* v. *Hasmat Ali* * as far at least as it applies to a right of pre-emption existing by custom. In that case upon the perfect partition of a village fresh wajib-ul-arzes were prepared for each mahal, recording that each mahal was to maintain a right of pre-emption as set forth in the wajib-ul-arz applicable to the whole village. The learned Judges held that such custom or contract, whichever it might be, must be held to be subject to such modifications as are rendered necessary by the partition. Blair, J., in delivering the judgment of the Court says :—"Now such custom or contract, whichever it may be, must be held to be subject to such modifications as are rendered

* The judgment in this case was as follows :—

BLAIR and BANERJI, JJ.—The suit out of which this second appeal arises is a suit brought by the respondent for pre-emption under the following circumstances :—The village in which the property sold is situated was subject to a wajib-ul-arz in which the custom or contract, in our opinion it matters not which, was set forth. A partition took place, and the village was formed into two mahals, one containing two-thirds of the whole undivided village, and the other one-third. The property sold was in a patti which may be briefly described as the two-thirds mahal. The vendee is a share-holder in the one-third mahal. The pre-emptor claims as being a co-sharer in the other mahal, namely, the two-thirds mahal. What happened on partition in relation to the rights of pre-emption is this. A wajib-ul-arz was prepared for each mahal, in which provision was made as to the right of pre-emption in words which it is needless to quote. Each mahal proposed to maintain and keep up the custom of pre-emption as set forth in the settlement wajib-ul-arz applicable to the whole village. Now such custom or contract, whichever it may be, must be held to be subject to such modifications as were rendered necessary by the partition. It seems to us that the substantial and central modification effected by that partition was that persons in each of the two mahals had ceased to be co-sharers in an unbroken village and had not become and never were co-sharers in the mahals created by the partition.

Therefore it happens that the pre-emptor is a co-sharer with the vendor and that the vendee is not a co-sharer of the vendor. Having regard to the judgment on the Full Bench case of *Dalganjan Singh* v. *Kalka Singh* (1) it seems to us that there is no escape from the conclusion that the pre-emptor's right is established. The case seems to fall within the ruling in *Dalganjan Singh's* case, and any amount of ingenuity to draw any substantial distinction between the two cases must fail. Following that case therefore, as we are bound to do, we hold that the plaintiff in this suit was entitled to pre-empt, and we dismiss the appeal with costs.

(1) (1899) I. L. R., 22 All., 1.

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GOBIND RAM v. MASHUULAH KHAN.

necessary by the partition. It seems to us that the substantial and central modification effected by that partition was that persons in each of the two mahals had ceased to be co-sharers in an unbroken village and had not become and never were co-sharers in the mahals created by the partition." If the learned judges intended by this to convey that a custom of pre-emption prevailing in a village can be regarded as liable to modification otherwise than by contract in the event of the village being partitioned, so as not any longer to prevail in its entirety, but in a modified form, we cannot agree with them. A custom is not, we think, capable of such an abrupt and automatic change as is implied in this language. We think that the old custom must be treated as prevailing in its entirety or else as abrogated.

It may be said that the custom which prevailed in this case was one which gave a right of pre-emption to persons between whom there was the common bond that they each owned a share of an undivided village and that when this common bond was severed by partition the custom ceased to be applicable. If this be so, then in the case before us the custom has ceased to be applicable and no longer can prevail, and there having been no agreement entered into on partition between the owners of the divided mahals as to pre-emption the right of pre-emption no longer exists. If on the other hand the custom still prevails, then the vendees respondents stand on the same level as regards pre-emption as the plaintiff. In either view the plaintiff's suit fails.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

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January 22.

PITAM SINGH (DECREE-HOLDER) *v.* TOTA SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Act No XV of 1877 *(Indian Limitation Act), schedule II, article* 179—*Execution of decree—Limitation—"Step in aid of execution."*

Held that on application made by the transferee of a decree asking that his name might be substituted on the record for that of the original decree-holder, and a further application asking for time to serve one of the judgment-debtors, whose address was not then known, with notice of the application for substitution were both applications made to the proper Court to take some step in aid of execution within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877.

ONE Musammat Gomti held a decree against Beni Singh the predecessor in title of Tota Singh and others. On the 12th of January 1901 Musammat Gomti sold this decree to Pitam Singh. On the 19th of March 1902, Pitam Singh, then admittedly within time, applied to the Court executing the decree to have his name substituted for that of the original decree-holder. Notice of this application was ordered to be given to the various judgment-debtors, but one of them, Pulandar Singh, could not be found, and on the 31st of May 1902 a further application was made by Pitam Singh asking for time in order that he might ascertain the address of Pulandar Singh. On the 5th of June 1902 Pitam Singh's application for substitution of his name was struck off. On the 31st of May 1905 Pitam Singh applied for execution of his decree by sale of the mortgaged property. The first Court (Munsif of East Budaun) held that the application was barred by limitation and this decision was upheld on appeal by the lower appellate Court (Subordinate Judge of Shahjahanpur). The decree-holder appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

KNOX and RICHARDS, JJ.—This second appeal arises out of execution proceedings taken by the appellant, who is the transferee of Musammat Gomti, the original decree-holder. The decree was transferred to Pitam Singh on the 12th of January 1901, and on the 19th of March 1902, Pitam Singh, admittedly within

* Second Appeal No. 924 of 1906, from a decree of Pandit Kanwal Bahadur, Subordinate Judge of Shahjahanpur, dated the 3rd of July 1906, confirming a decree of Syed Muhammad Shah, Munsif of East Budaun, dated the 22nd of December 1905.

time, applied to the Court executing the decree that his name might be substituted for the name of Musammat Gomti. Notice in writing of this application was by the Court's order sent to the various judgment-debtors. One of them, Pulandar Singh, could not be found, and on the 31st of May 1902 Pitam Singh applied to the Court for further time, stating that he could not find the address of Pulandar Singh. The decree will be barred unless it be held that both these applications are steps in aid of execution within the meaning of clause (4) of article 179 of the second schedule of the Indian Limitation Act, 1877. The respondent contends that inasmuch as the application of the 19th of March 1902 merely asked for substitution of names and did not contain any prayer for execution, the application is not one in accordance with law to the proper Court to take some step in aid of execution of decree. The application of the 19th of March 1902 was evidently intended by Pitam Singh as a necessary preliminary to further proceedings in execution. The Court dealt with it as such. The application of the 31st of May was also necessary to carry into effect the order of the Court passed on the application of the 19th of March. We have no doubt that both the applications were *bonâ fide*, and the delay that has since taken place is explained by a suit which was instituted to set aside the transfer by Musammat Gomti in favour of Pitam Singh. The only question we have to decide is whether these applications come within the language used in clause (4) of article 179. We decide this question in the affirmative. They were *bonâ fide* applications made with the intention of keeping the decree alive, and the decree could not be executed until notice of the application under section 232 had been given to the transferor and the judgment-debtors, and their objections heard. There has certainly been considerable delay and this affects our order regarding costs. We decree the appeal, set aside the decrees of both the Courts below and return the proceedings through the lower appellate Court to the Court of first instance with directions that that Court place the proceedings upon the file of pending proceedings and proceed according to law. We make no order as to costs.

Appeal decreed and cause remanded.

Before Mr. Justice Sir George Knox and Mr. Justice Richards

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January 23.

BALKISHAN DAS (PLAINTIFF) *v.* MADAN LAL AND OTHERS (DEFENDANTS).*

Bond—Unconscionable bargain—Circumstances under which relief may be granted by the Court

A person of the age of some twenty-eight years, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of Rs 500, with interest which amounted to Rs 37 8-0 per centum per annum, with six-monthly rests. The bond further contained a stipulation that the borrower should not be empowered to repay the money within three years, and if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate mentioned. *Held* that although it could not be said that the execution of this bond was procured by means of undue influence or that the rate of interest was penal, nevertheless the bargain was an unconscionable bargain against which the Court might properly give relief. The High Court affirmed the decree of the lower appellate Court which gave the plaintiff the principal sum with simple interest at the rate of 24 per centum per annum. *Madho Singh* v. *Kashi Ram* (1), *Kirpa Ram* v *Sama-ud-din Ahmad Khan* (2), *Kamini Sundari Chaudhrani* v. *Kali Prosunno Ghose* (3), *Kunwar Ram Lal* v. *Nil Kanth* (4) and *Rajah Mokham Singh* v *Rajah Rup Singh* (5) referred to

ON the 15th December 1898 the principal defendant executed in favour of the plaintiff a bond for Rs. 500, with interest which amounted to Rs. 37-8-0 per cent. per annum, with six-monthly rests. The bond further contained a stipulation that the borrower should not be empowered to pay the money within three years, and if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate mentioned. The defendant was a young man of some 28 years of age, the son of a well-to-do father, but himself of extravagant habits and dependent upon his father. On the 5th December 1904 the plaintiff sued to recover the money due on the bond above mentioned and claimed in this suit a total sum of Rs. 3,897-1-0. The defendant pleaded that at the time of the loan he had fallen into dissolute habits, that his father had refused to provide him with any money and that the bargain he had entered into was a hard and unconscionable bargain which should not be enforced against

* Second Appeal No. 63 of 1906, from a decree of H. J Bell, Esq., District Judge of Aligarh, dated the 20th of September 1905, confirming a decree of Maulvi Muhammad Shafi, Subordinate Judge of Aligarh, dated the 22nd of February 1905

(1) (1887) I. L. R., 9 All., 228
(2) (1903) I. L. R., 25 All., 284
(3) (1885) I. L. R., 12 Calc., 225
(4) (1893) I. L. R., 20 I. A., 112
(5) (1893) L. R., 20 I. A., 127

him. The Court of first instance after reviewing the circumstances under which the loan had been taken came to the conclusion that the bargain was a hard and unconscionable bargain which ought not to be enforced according to its terms. In the end that Court gave the plaintiff a decree for Rs. 500 with simple interest at the rate of Rs. 24 per cent. per annum. The plaintiff appealed, claiming interest according to the terms of the bond, but the lower appellate Court (District Judge of Aligarh) came to much the same conclusion on the evidence as the first Court, and dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Sir *Walter Colvin*, Pandit *Moti Lal Nehru* and Babu *Girdhari Lal Agarwala*, for the appellant.

Dr. *Satish Chandra Banerji* (for whom Babu *Surendra Nath Sen*), for the respondents.

RICHARDS, J.—This was a suit to enforce a mortgage bond. It appears that the defendant executed a bond in favour of the plaintiff to secure a sum of Rs. 500 with interest which amounted to Rs. 37-8-0 per cent. per annum with six-monthly rests. Furthermore the bond contained a stipulation that the defendant borrower should not be empowered to pay the money within three years, and if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate already mentioned. The amount claimed by the plaintiff is the sum of Rs. 3,897-1-0. The defence was an allegation that at the time of the loan the defendant had fallen into dissolute habits, that his father had refused to provide him with any money and that the bargain he had entered into was a hard and unconscionable bargain, which should not be enforced against him. The Court of first instance set forth the facts that I have already mentioned and says as follows:—"It was under such circumstances that the bond in suit was executed. The terms of the bond in the face of them disclose a hard and unconscionable bargain. Only Rs. 200 were paid before the registering officer, the rest being previous debts. The rate of interest stipulated was Rs. 37-8-0 per cent. per annum with six-monthly rests. The result was that Rs. 500 in a few years had swollen to Rs. 3,897-1-0. It also stipulated that the debtor would have no power to pay off the bond within three years. On the whole I find that it was a hard and unconscionable

bargain, brought about by plaintiff taking advantage of defendant's youthful folly." The Court then directed that the claim for Rs. 500 principal with simple interest at the rate of Rs. 24 per cent. per annum should be decreed. The plaintiff appealed against this decree in his favour contending that he was entitled to the full interest stipulated for in the bond. The lower appellate Court dismissed the appeal.

In the course of the judgment the learned Judge says that the defendant was no doubt a man in good position, of 28 years of age and that there was no reason to suppose that any undue influence was brought to bear on him or that any unfair advantage was taken of him. He says on the other hand that he was a profligate, addicted to drink, and his father had stopped all supplies, but he was determined to raise money at any cost. While the learned Judge makes these remarks he nevertheless finds that the bargain was a hard and unconscionable bargain. He expresses no disagreement with the finding of the Court of first instance, and as a result he gave his decision dismissing the appeal.

Taking the bargain as set forth in the bond it is impossible to say that it was anything else except a hard bargain. The stipulation that the borrower should not relieve himself from the onus of the terms of the loan by repayment before the expiration of three years, while the lender might at any moment enforce his security, throws a flood of light on the whole transaction. Taking this in conjunction with the admitted facts that at the time the defendant had given way to intemperance and profligacy, it is impossible to say that there was no evidence upon which the Court could come to a conclusion that the bargain was hard and unconscionable. The appellant takes his stand upon the alleged findings of fact of the lower appellate Court and submits that upon these findings of fact, unless the interest is by way of penalty within the meaning of the section 74 of the Contract Act, as amended, he is entitled to his full rate of interest. In my judgment the rate of interest was not a penal rate within the meaning of that section. But I do not agree with the learned counsel for the appellant as to the effects of the findings of fact of the Court below. In my judgment both the Courts below intended to find and did find upon evidence that the bargain which the

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appellant seeks to enforce is a hard and unconscionable bargain. The Courts in India have in many cases refused to enforce bargains of this nature, and in a very recent case—*Kirpa Ram* v. *Sirnr-ud-din Ahmad Khan* (1)—a Bench of this Court dismissed an appeal against a decree in exactly the same terms as the decree now appealed against. There the rate of interest was 2 per cent. per mensem with monthly rests. The bond had been entered into by a young man, aged 18, of dissolute habits. The bargain was there held to be an unconscionable bargain. In the present case the facts only differ by the rate of interest being something more while the rests were less frequent and the age of the borrower was 28 instead of 18. These are mere distinctions in the details of the evidence. The evidence may or may not have been as strong in the present case as in the case just referred to, but there were in both cases circumstances upon which the Court was entitled to arrive at the conclusion at which it did arrive, *viz.*, that the bargain was under the circumstances such a hard and unconscionable bargain that the Court ought not to enforce it without modification. As the appellant has thought fit to prefer a second appeal, I think he ought to pay the costs. I would accordingly dismiss the appeal with costs.

KNOX, J.—I fully agree with what my brother Richards has said. As he has pointed out, the Court below, while finding that "the borrower was a man of 28 years of age, of good position, son of a wealthy man, and he was himself a man of business, an Agarwala Bania by caste, and a Municipal Commissioner. There is no reason at all to suppose that any undue influence was brought to bear on him or that any unfair advantage was taken of him," also finds that the contract was beyond doubt unconscionable. Further, it gave effect to that finding by a decree, which awarded simple interest at 24 per cent. per annum from the date of the bond to the date of the realization of the money instead of the much larger sum asked for in the plaint by way of interest. The learned counsel for the appellant strenuously contended that upon the former of these findings his client was entitled to the sum claimed as the sum asked for by way of interest could not be considered to be a penalty. I agree with him that the case is not

(1) (1903) I. L. R., 25 All., 284.

one which falls under the terms of section 74 of the Contract Act as amended. But the learned vakil for the respondent, to whom we are indebted for a very exhaustive and careful argument, has taken an equally stout stand upon the latter finding. He referred us to a long array of cases in which the Courts holding that they had to deal with unconscionable bargains refused to give effect to these bargains as contained in the contracts and granted relief on terms consonant with equity. The following cases were cited to us :—

(1) *Madho Singh* v. *Kashi Ram* (1).

(2) *Kirpa Ram* v. *Sami-ud-din Ahmad Khan* (2).

(3) *Kamini Sundari Chaodharani* v. *Kali Prosunno Ghose* (3).

(4) *Kunwar Ram Lal* v. *Nil Kanth* (4).

(5) *Rajah Mokham Singh* v. *Rajah Rup Singh* (5.)

From a careful consideration of these cases I am prepared to hold that even where no undue influence has been brought to bear on the man or any unfair advantage shown to have been taken of him, the bargain may still be an unconscionable one. In the present case the security given was a *pacca nishastgah*. It is described by the learned counsel for the appellant as property of little value, specially as the borrower had only a fractional interest in it. If this be the case, we have then a case on the appellant's own showing, in which the borrower had property of little value available, and the inference is that he was trusted on the credit of his expectations, specially when it is admitted that he was the son of a father who was both rich and respectable.

Again when we look at the terms contained in the bond we find not only excessive interest, but a very one-sided term, whereby the lender was empowered to sue for the money lent at any time, but the borrower, even if he paid the money within three years next after the date of the contract, would still have to pay high rate of interest stipulated for just as if he had made no payment at all. Upon my asking the learned counsel for the appellant whether this provision did not mean that if the borrower had repaid the sum borrowed within a day or two of borrowing it,

(1) (1887) I. L. R., 9 All., 238.
(2) (1903) I. L. R., 25 All., 284.
(3) (1885) I. L. R., 12 Calc., 226.
(4) (1893) L. R., 20 I. A., 112.
(5) (1893) L. R., 20 I. A., 127.

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he would still have to pay for the Rs. 500 thus borrowed the sum of Rs. 562 odd, it was admitted that this was the case. These terms speak for themselves. They are *primâ facie* oppressive and extortionate, and such as a man of ordinary sense and judgment cannot be supposed likly to give his free consent to. Where both these conditions exist, even if it be not shown that the lender went out of his way to bring any active influence upon the borrower, still the bargain entered into may be an unconscionable one. Such a bargain seems to me to be similar to the bargain in the case of *Madho Singh* v. *Kashi Ram* (1). I find considerable difficulty in distinguishing this case from that case if it can at all be distinguished. I therefore fully agree.

BY THE COURT.

This appeal is dismissed with costs.

Appeal dismissed.

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January 23.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

HASHMAT ALI (PLAINTIFF) v. MUHAMMAD UMAR (DEFENDANT).*

Act No. IV of 1893 *(Partition Act), section* 4—"*Dwelling-house belonging to an undivided family*"—*Muhammadans.*

Held that the expression 'a dwelling house belonging to an undivided family" as used in section 4 of the Partition Act, 1893, is not applicable to a house belonging to a Muhammadan family. *Amma Ratam* v. *Zia Ahmad* (2) referred to.

THE plaintiff in this case sued for partition of a one-fifth share in a house belonging to a Muhammadan family, having acquired the share by purchase. The defendant objected that inasmuch as the plaintiff was not "a member of the defendant's undivided family" and the value of the share claimed by him was small, actual partition ought not to be granted, but the plaintiff might receive the value of his share in money. The Court of first instance (Munsif or Nagina) rejected this plea upon the ground that section 4 of the Partition Act was not applicable, and directed a partition. The defendant appealed. The lower appellate Court (Additional District Judge of Moradabad) held that section 4 of the Act in question did apply, and, setting aside the Munsif's

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* First Appeal No. 71 of 1906 from an order of W. F. Kirton, Esq., District Judge of Moradabad, dated the 3rd of May 1906.

(1) (1887) I. L. R., 9 All., 228. (2) (1890) I. L. R., 13 All., 282.

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decision, remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the plaintiff appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

The respondent was not represented.

KNOX and RICHARDS, JJ.—This appeal arises out of an order passed by the lower appellate Court remanding the case under section 562 of the Code of Civil Procedure for further trial. The suit was brought by the plaintiff, who had acquired a one-fifth share in a house, for partition of the share which he had acquired. Both the plaintiff and the defendants (who are admittedly the owners of the remaining four-fifths of the house), are Muhammadans. The Court of first instance granted the plaintiff the relief prayed for, and held that the defendants were not entitled to the benefit given by section 4 of the Partition Act, 1893, inasmuch as the property to be partitioned was not "a dwelling house belonging to an undivided family." The lower appellate Court held that section 4 did apply in the case of Muhammadans, and overruling the Court of first instance upon the preliminary point, sent the case back for trial as already stated. It is here contended that section 4 cannot apply except in the case of an undivided Hindu family, and our attention was called to the Full Bench decision of this Court in *Amme Raham* v. *Zia Ahmad* (1). The respondent is not represented, but on the analogy of the Full Bench ruling we hold with some regret that section 4 does not apply. We decree the appeal, set aside the order of the lower appellate Court and restore the decree of the Court of first instance. The appellant will get his costs.

Appeal decreed.

(1) (1890) I. L. R., 13 All., 282.

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January 31.

Before Mr. Justice Banerji.

DAULAT RAM (PLAINTIFF) *v.* RAM LAL (DEFENDANT)*

Hindu Law—Adoption—Adoption during wife's pregnancy.

Held that the fact that at the time of making an adoption the wife of the adopting father is pregnant does not affect the validity of the adoption. *Nagabhushanam* v. *Seshammagaru* (1) and *Hanmant Ramchandra* v *Bhimacharya* (2) followed. *Narayana Reddi* v. *Vardachala Reddi* (3) dissented from.

THE plaintiff in this case sued for a declaration that the defendant's alleged adoption by one Murli was invalid and for recovery of possession of certain land. The Court of first instance (Munsif of Koil) decreed the claim, finding as to the adoption that it was invalid because at the time the wife of the plaintiff's adoptive father was pregnant. On appeal this decree was reversed by the Additional Subordinate Judge of Aligarh, who found the adoption to be valid. The plaintiff thereupon appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

BANERJI, J.—The only question in this case is whether the pregnancy of his wife is a bar to the right of a Hindu to adopt a son. The suit in which this question has arisen was brought by the appellant for a declaration that the respondent Ram Lal was not the adopted son of one Murli. The Court below has found that Murli did adopt Ram Lal, but it seems to be of opinion that at the time of adoption Murli's wife was pregnant. It has, however, held that the existence of pregnancy did not invalidate the adoption. The learned vakil for the appellant contends that this view is erroneous and in support of his contention has referred to an old ruling of the Madras Sudder Court in *Narayana Reddi* v. *Vardachala Reddi* (3) in which it was held that an adoption is invalid if at the time of the adoption the adoptor's wife is pregnant. This ruling was considered by that Court in the later case of *Nagabhushanam* v. *Seshammagaru* (1) and was dissented from. The learned Judges after referring to the authorities on the subject came to the conclusion that an adoption by a

*Second Appeal No. 474 of 1905 from a decree of Maulvi Maqbul Bakhsh, Additional Subordinate Judge of Aligarh, dated the 8th of March 1905, reversing a decree of Babu Jagat Narain, Munsif of Aligarh, dated the 17th of November 1904.

(1) (1881) I. L. R., 3 Mad., 180 (2) (1887) I. L. R., 12 Bom., 105.
(3) M. S. D., 1859, 97.

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Hindu with knowledge of his wife's pregnancy was not invalid. The same view was held by the Bombay High Court in *Hanmant Ramchandra* v. *Bhimacharya* (1). I may also refer to Mayne's Hindu Law, 7th Edition, p. 137, and Sircar's Tagore Law Lectures, 1891, p. 190. No original authority of Hindu law has been cited on behalf of the appellant in support of the contrary view, which seems to be opposed to general principles. I accordingly dismiss the appeal with costs.

Appeal dismissed.

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February 2.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

SHAMRATHI SINGH AND OTHERS (DEFENDANTS) v. KISHAN PRASAD AND OTHERS (PLAINTIFFS).*

Hindu law—Joint Hindu family—Family business—Suit to recover a debt due to the firm—Parties to such suit.

Held that the managing members of a joint Hindu family carrying on a joint family business are not entitled to maintain a suit in their own names against debtors of the family without joining with them in the suit either as plaintiffs or defendants all the other members of the family. *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajypad* (2), *Balkrishna Moreshwar Kunte* v *The Municipality of Mahad* (3), *Ramsebuk* v *Ramlall Koondoo* (4), *Kalidas Kevaldas* v. *Nathu Bhagvan* (5), *Imam ud-din* v *Laladhar* (6), *Alagappa Chetti* v. *Vellian Chetti* (7) and *Angamuthu Pillai* v. *Kolandavelu Pillai* (8) referred to. *Pateshri Partop Narain Singh* v. *Rudra Narain Singh* (9) distinguished.

THIS was a suit to recover a sum of Rs. 9,240-7-0 alleged to be due to the plaintiffs by the defendants on an account stated on the 9th of August 1901. The plaintiffs, Kishan Prasad, Bishan Prasad and Jamna Prasad, sued as managers of a joint family business styled Manorath Bhagat Dhana Ram carried on in the District of Ballia. The suit was filed on the 3rd of June 1904. The debt sought to be recovered represented, according to the plaintiffs, the balance upon various money dealings between them and the defendants, and it was alleged that the account

* First Appeal No 31 of 1905 from a decree of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 24th of September 1904.

(1) (1887) I. L. R., 12 Bom., 105.
(2) (1882) I. L. R., 3 Mad., 234
(3) (1886) I. L. R., 10 Bom., 32.
(4) (1881) I. L. R., 6 Calc., 815.
(5) (1883) I. L. R., 7 Bom., 217.
(6) (1892) I. L. R., 14 All., 524.
(7) (1894) I. L. R., 18 Mad., 32.
(8) (1896) I. L. R., 23 Mad., 159.
(9) (1904) I. L. R., 26 All., 528.

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had been adjusted on the 9th of August 1901, and the balance admitted by the defendants Shamrathi Singh, Mahadeo Singh and Rajnandan Singh. In their written statements the principal defendants took objection that the suit could not be maintained without all the members of the plaintiffs' family being made parties to it. In consequence of this objection the plaintiffs on the 22nd of August 1904 applied to the Court to have the other members of the family made parties. In the result, by an order of the Court of the 8th of September 1904 certain members of the plaintiff's family, were added as plaintiffs, and two as defendants; the original plaintiffs, however, contended that they as the managing members of the family were entitled to sue in their own names on behalf of the rest of the family. This contention was admitted by the Court (Subordinate Judge of Ghazipur), which passed a decree in the plaintiffs' favour. Against this decree the defendants appealed to the High Court, contending that the original plaintiffs were not entitled to sue alone and that by the time the other members of the family had been made parties to the suit it was barred by limitation.

Mr. *Muhammad Rusoof* and Munshi *Govind Prasad*, for the appellants.

Mr. *Abdul Majid* and the Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The main question in this appeal is one of limitation. The suit was brought to recover a sum of Rs. 9,240-7-0 alleged to be due on foot of an account stated on the 9th of August 1901. The plaintiffs Kishan Prasad, Bishan Prasad and Jamna Prasad instituted the suit on the 3rd of June 1904 as managers of a joint family business, styled Manorath Bhagat Dhana Ram, carried on in the District of Ballia, to recover the debt which was due by the family of the defendants in respect of money dealings. The dealings between the parties had been carried on for several years, and on the 9th of August 1901 the accounts were adjusted, when the defendants Shamrathi Singh, Mahadeo Singh and Rajnandan Singh admitted the correctness of the balance and affixed their signatures to the account, Mahadeo Singh signing it on behalf of himself as well as of Shamrathi Singh.

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In their written statements the principal defendants objected to the array of plaintiffs complaining that all the members of the plaintiffs' family had not joined in the suit. In consequence of this objection on the 22nd of August 1904 the plaintiffs applied to the Court to have the other members of the family added as parties, stating in their petition that they (the original plaintiffs) were the managers of the firm and on that account brought the suit in their own names alone, but that with a view to remove the objection of the defendants, they desired that the names of the other members of the family should be brought on the record. By order of the 8th of September 1904 the plaintiffs 4—12 were brought on the record as plaintiffs, and Mahadeo Prasad and Chhote Lal, two members of the family, were added as defendants. If the added plaintiffs were necessary parties to the suit, it is admitted that on the 8th September 1904, when they were added as plaintiffs, the suit was barred by limitation. But on behalf of the respondent it was contended that the original plaintiffs were the managing members of the joint family and as such were entitled to institute the suit in their own names alone on behalf of themselves and the other members of the family. The learned Subordinate Judge acceded to this contention and passed a decree in favour of the plaintiffs.

One of the grounds of appeal is that a decree against the persons of the minor defendants ought not to have been granted. Mr. *Sundar Lal* on behalf of the respondents admits that this is so, and so far as the minor defendants are concerned the decree should be satisfied out of the joint family funds alone. So far the appeal must in any case succeed.

As regards the main question it is first necessary to determine whether or not Kishan Prasad, Bishan Prasad and Jamna Prasad were the managing members of the family when the suit was brought. It appears that at the time of the institution of the suit dissension existed between some of the members of the plaintiffs' family and hence we find two of them supporting the defendants' case. The evidence of these two witnesses only has been translated and printed by the appellants. These are the depositions of Sarju Prasad and Lachhmi Prasad, sons of the plaintiff Kishan Prasad, and themselves plaintiffs. Sarju Prasad

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deposed that there was no leading member in the family since about 1890, and that the business of the firm was carried on under the orders of all the proprietors. Then he modified this statement and said that the names of those by whose orders the business was carried on were Kishan Prasad, Bishan Prasad, himself (the witness), Jamna Prasad and Lachhmi Prasad. In cross-examination he stated that all the suits relating to the family, the ilaka or the firms brought since 1890 were instituted in the names of Kishan Prasad, Bishan Prasad and Jamna Prasad only, or in the name of Debi Prasad as long as he lived. Debi Prasad we may mention was a son of the plaintiff Jamna Prasad. We now come to the evidence of Lachhmi Prasad. He deposed that hundis were drawn by the firm under the signatures of all—and then he said they are "signed by any of us who happen to be present." He admitted, however, that the names of Kishan Prasad, Bishan Prasad and Jamna Prasad were entered in respect of the whole ilaka and the names of the other members of the family were not so entered. As against this evidence we have the evidence of the plaintiffs Bishan Prasad and Kishan Prasad who deposed that they and Jamna Prasad were the managing members of the family.

The learned Subordinate Judge came to the conclusion on the evidence that the original plaintiffs were the managing members of the family and sued as such, and we have no hesitation whatever in agreeing with him as to this. The question then is whether the managing members of a joint family carrying on a joint family business are entitled to maintain a suit in their own names against debtors of the family without joining with them in the suit either as plaintiffs or defendants all the other members of the family.

The learned Subordinate Judge held on this point that inasmuch as all the business carried on by the plaintiffs' family was carried on in the names of the three original plaintiffs, and that all suits relating to the family which had been previously instituted in the Civil or Revenue Courts had been instituted only in the names of these plaintiffs, therefore the suit was properly instituted in their names for the benefit of all the members of the family, and that it was not necessary

for the other members to join in the suit or to be made parties to it.

The Subordinate Judge is in error in saying that the business was carried on in the names of the three original plaintiffs. It was carried on in the name of the plaintiffs' firm. The evidence of Bishan Prasad, Muhammad Suleman and Amjad Ali Khan coupled with the plaintiffs' own statement in the plaint shows this.

If the question had been an open one, there is a good deal to be said in favour of the view taken by the Court below; but it appears to us that it is concluded by authority. In the case of *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayjipad* (1) it was held by Turner, C.J., and Kindersley, J., that "unless where by a special provision of law co-owners are permitted to sue through some or one of their members all co-owners must join in a suit to recover their property. Co-owners may agree that their property shall be managed and legal proceedings taken by some or one of their number, but they cannot invest such person or persons with the competency to sue in his own name on their behalf or if sued to represent them." Sargent, C. J., adopted this statement of the law in the case of *Balkrishna Moreshwar Kunte* v. the *Municipality of Mahad* (2). In the case of *Ramsebuk* v. *Ramlall Koondoo* (3) two of the sons out of a joint Mitakshara family, consisting of a father and three sons, and the widow and sons of a deceased son, and carrying on business in partnership, sued on a *hath-chitta* for recovery of the amount payable thereunder. When the suit came on for hearing an objection was taken that all the parties who ought to sue were not on the record. Thereupon on the application of the original plaintiffs the names of the father and the third son were added and the plaintiffs were described as surviving partners of the deceased son. At the time these additional persons were made parties, the suit was as regards them barred by limitation. It was held that inasmuch as the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs, and the added plaintiffs were barred by section 22 of the Limitation Act, the claim of the original plaintiffs was also barred. Garth, C. J., who delivered the judgment of the Court, in the course of it observed:—"When a joint family, or

(1) (1881) I. L. R., 5 Mad., 234. (2) (1885) I. L. R., 10 Bom., 32.
(3) (1881) I. L. R., 6 Calc., 816

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any members of it, carry on a trade in partnership and contract with the outside public in the course of that trade, they have no greater privilege than other traders. If they are really partners they must be bound by the same rules of law for enforcing their contracts in Courts of law as any other partnership." A similar decision was arrived at by a Bench of the Bombay High Court in the case of *Kalidas Kevaldas* v. *Nathu Bhagvan* (1). The same question was considered in the case of *Imam-ud-din* v. *Lakdhar* (2). In that case a suit was brought upon two hundis by one only of two members of a firm. The defendants in their written statement, as here, raised the objection that all necessary parties were not joined as plaintiffs. Upon that the other partner applied to be made a co-plaintiff and the Court acceded to the application. At the time when he was made a co-plaintiff the suit was barred by limitation, and the Subordinate Judge on that account dismissed it. On appeal the District Judge allowed the appeal on the ground that the defendants did not raise the plea of non-joinder at the earliest possible period. On second appeal Edge, C.J., and Tyrrell, J., after a review of the authorities, set aside the order of the District Judge and affirmed the decree of the Court of first instance, holding that all the surviving partners of the firm should have been plaintiffs in the suit; and further that where a judge, acting under section 32 of the Code of Civil Procedure, adds a person as a necessary plaintiff after the period of limitation for a suit by him alone, or with others, has expired, section 22 of the Indian Limitation Act, 1877, would clearly apply to the right of suit of the person so added, and the suit could not be maintained without him. In Madras it has been held that the proposition that the manager of a Hindu family can sue without joining those interested with him is one which cannot be supported. *Alagappa Chetti* v. *Vellivin Chetti* (3) and *Angamuthu Pillai* v. *Kolandavelu Pillai* (4).

Mr. Mayne in his work on Hindu Law in dealing with this question says, at pp. 368 and 369 of the sixth edition:—"A necessary consequence of the corporate character of the family

(1) (1883) I. L. R., 7 Bom., 217.
(2) (1882) I. L. R., 14 All., 624.
(3) (1894) I. L. R., 18 Mad., 33.
(4) (1899) I. L. R., 23 Mad., 190.

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holding is that wherever any transaction affects that property all the members must be privy to it, and whatever is done must be done for the benefit of all, and not of any single individual. For instance, a single member cannot sue or proceed by way of execution to recover a particular portion of the family property for himself whether his claims be preferred against a stranger who is asserted to be wrongfully in possession or against his co-parceners. If the former, all the members must join and the suit must be brought to recover the whole property for the benefit of all.", and later on:—"One member cannot sue by himself without joining or asking the consent of the others and making the defect good by joining the others as defendants. If from any cause, such as lapse of time, the other members cannot be joined as plaintiffs, the whole suit will fail."

Our decision in the case of *Pateshri Partap Narain Singh* v. *Rudra Narain Singh* (1), which has been relied on by Mr. *Sundar Lal*, does not help the contention advanced on behalf of the respondents. That decision was based upon the peculiar circumstances of the case. The objection raised as to non-joinder of parties was not pressed by the defendants, and it was only on appeal that we pointed out the defect in this respect and amended it. We observed in our judgment that if the question had been raised at the trial, the plaintiff would no doubt have obtained in good time the consent of his brother to his name being added to the array of parties to the proceedings.

For the foregoing reasons we allow this appeal, set aside the decree of the Court below, and dismiss the plaintiffs' suit with costs in both Courts.

[See also *Gopal Das* v. *Badri Nath* (2).—Ed.]

Appeal decreed.

(1) (1904) I. L. R., 26 All., 528. (2) Weekly Notes, 1904, p. 282.

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February 7

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HASAN ALI KHAN AND ANOTHER (PLAINTIFFS) *v.* MAZHAR-UL-HASAN AND OTHERS (DEFENDANTS).*

Act No. XIX of 1873 (N.-W. P. Land Revenue Act), sections 154 and 190—Mahal taken under direct management—Rent of sir land fixed by Collector—Sale of mahal before release from direct management.

A mahal was taken by the Collector under direct management and the late proprietor was recorded as ex-proprietary tenant of the sir land and his rent was fixed by the Collector under the provisions of section 190 of Act No. XIX of 1873. While still under direct management the mahal was sold. The purchaser paid up the arrears of land revenue due thereon and possession was given to him. *Held* that the purchaser was entitled to claim from the ex-proprietary tenant the rent fixed by the Collector: it was not incumbent upon him to get the rent fixed again.

THE suit out of which this appeal arose was instituted against one Ali Mazhar as an ex-proprietary tenant to recover the rent of certain lands which had been his *sir*. He had been the proprietor of the mahal in which he held this *sir* land. Many years ago Ali Mazhar made default in paying the revenue assessed on the mahal, whereupon the Collector, acting under the powers conferred on him by the North-Western Provinces land Revenue Act of 1873, section 154, attached the mahal and took it under direct management. At the same time, acting under the provisions of section 190 of the same Act, the Collector fixed the rent to be paid in future by Ali Mazhar in respect of this land. Ali Mazhar was recorded as an ex-proprietary tenant. This suit is one to recover the rent so fixed, and alleged to be due and payable for the years 1308 and 1309 *Fasli* by the respondents, the representatives in interest of Ali Mazhar, now dead. That rent was paid for many years by Ali Mazhar as the rent of the ex-proprietary holding. On January 20th, 1899, Ali Mazhar's rights as proprietor of the mahal were sold in execution of a Civil Court decree, held by the Bank of Upper India and were purchased by one Gobind Deo. Gobind Deo had his name entered as proprietor and that of Ali Mazhar removed. Gobind Deo did not get actual possession of the mahal, which continued to be held under direct management. Eventually Gobind Deo sold the mahal in June 1901 to the plaintiffs

* Appeal No. 74 of 1906 under section 10 of the Letters Patent.

appellants, who obtained mutation of names in their favour in August of that year. In that month they paid up to the Collector the arrears of revenue still due on the mahal, which was thereupon released from direct management and handed over to them. That was on August 27th, 1901.

In the present suit the plaintiffs obtained a decree for the rent of 1309 Fasli, and that decree was confirmed on appeal by the lower appellate court. The defendants, however, appealed to the High Court, when, their appeal coming before a single judge, the decrees of the courts below were set aside, and the suit dismissed. The plaintiffs therefore appealed under section 10 of the Letters Patent of the Court

Messrs. *W. Wallach* and *B. E. O'Conor*, for the appellants.

Babu *Satya Chandra Mukerji*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal against a decree of one of the learned Judges of this Court sitting alone.

The suit was instituted against one Ali Mazhar as an ex-proprietary tenant to recover the rent of certain lands which had been his *sir*. He had been the proprietor of the mahal in which he held this *sir* land. Many years ago Ali Mazhar made default in paying the revenue assessed on the mahal, whereupon the Collector, acting under the powers conferred on him by the North-Western Provinces Land Revenue Act of 1873, section 154, attached the mahal and took it under direct management. At the same time acting under the provisions of section 190 of the same Act, the Collector fixed the rent to be paid in future by Ali Mazhar in respect of this land. Ali Mazhar was recorded as an ex-proprietary tenant. This suit is one to recover the rent so fixed, and alleged to be due and payable for the years 1308 and 1309 Fasli by the respondents, the representatives in interest of Ali Mazhar now dead. That rent was paid for many years by Ali Mazhar as the rent of the ex-proprietary holding. On January 20th, 1899, Ali Mazhar's rights as proprietor of the mahal were sold in execution of a Civil Court decree, held by the Bank of Upper India and were purchased by one Gobind Deo. Gobind Deo had his name entered as proprietor and that of Ali Mazhar removed. Gobind Deo of course did not get actual possession of the mahal, which continued to be held under direct

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management. Eventually Gobind Deo sold the mahal in June 1901 to the plaintiffs appellants, who obtained mutation of names in their favour in August of that year. In that month they paid to the Collector the arrears of revenue still due on the mahal, which was thereupon released from direct management and handed over to them. That was on August 27th, 1901.

From the above it will be seen that Ali Mazhar ceased to be even nominal proprietor of the mahal in the year 1899 when his name was removed from the village *khewat*, but he continued to be recorded as an ex-proprietary tenant, paying the rent which had been fixed by the Collector.

The present suit for the arrears of rent for the years 1308 and 1309 Fasli was instituted in October 1902. We are now concerned with the rent of 1309 Fasli only.

The Court of first instance and the lower appellate Court gave the plaintiffs a decree for the rent of that year. On second appeal to this Court that decree has been set aside and the suit dismissed by a learned Judge of the Court. Hence this appeal.

The reasons given by our learned brother for reversing the decree of the two lower Courts are:—"I hold that the rent not having been fixed by agreement, by order of a Settlement officer or by an order under Act No. XII of 1881, it was incumbent on the plaintiffs, before they could recover arrears of rent on the ex-proprietary holding, to take steps to have the rent determined under the Rent Act." Now if Ali Mazhar had ever for a day regained his status as a proprietor before the sale of the mahal to the respondents, we might have come to the same conclusion as our learned brother. If the attachment and direct management had been withdrawn, Ali Mazhar would have immediately regained his status as full proprietor and would have automatically ceased to be an ex-proprietary tenant. On a subsequent sale to the plaintiffs and on Ali Mazhar again becoming an ex-proprietary tenant the plaintiffs in the absence of any agreement must have applied to have the rent of the ex-proprietary holding determined under the Rent Act. But such an event did not occur. From and after the date of the sale to Gobind Deo in 1899 Ali Mazhar no longer possessed any proprietary rights in the mahal. He remained an ex-proprietary tenant whose rent had been fixed

by the Collector, and he still held that status when the plaintiffs purchased the mahal. In our opinion when the mahal was transferred to the plaintiffs by the Collector in August 1905, the position of Ali Mazhar was that of a tenant whose rent had been fixed by a competent tribunal, and the plaintiffs on the transfer to them acquired the right to recover the rent which Ali Mazhar had up to then been paying to the Collector. We are unable to accept the contention that the rent fixed by the Collector was fixed only for the period of direct management, and that it ceased to be payable when the Collector handed over the mahal to the plaintiffs. In the section itself there is no indication of such an intention. It does not even prescribe the person to whom the rent is to be paid. It is couched in most general and wide language and might well—without straining of language—be interpreted to mean a determination of rent to hold good till altered by competent authority. In connection with this argument we would point out that section 190 of the Revenue Act provides for the case of sale for arrears of revenue as well as for cases of attachment, farming, etc., and directs that on sale the Collector is to have the late proprietor of any sir land recorded as an ex-proprietary tenant and to fix the rent to be paid by the ex-proprietary tenant for the land. *That* rent clearly was not a rent payable to the *Collector*, but to the *new proprietor*. The Collector could have no claim to it. But under the rule of law laid down by our learned brother the new proprietor would not be entitled to recover any rent of the ex-proprietary holding until he had had the rent of the holding determined under section 14 of the Rent Act, XII of 1881. We are unable to accede to that view of the law. We think that the new proprietor would be entitled to receive from the ex-proprietor the rent fixed by the Collector under the authority of section 190, and that the law does not impose on him the vexatious burden of taking action under section 14 of the Rent Act. Similarly in the present case we think the plaintiffs are entitled to receive from the ex-proprietary tenants the rent fixed by the Collector, who in that matter was a competent tribunal acting under statutory power. We do not concur with the District Judge in holding that the Collector's procedure in fixing the rent was irregular. He ascertained the rates of rents

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payable by tenants-at-will for similar lands and fixed the rental of the ex-proprietary tenant at four annas in the rupee lower. Ali Mazhar apparently raised no objection and paid for many years the rent so fixed.

For the above reasons, being unable to agree in the reasons given by our learned brother, we set aside the decree under appeal and restore the decree of the lower appellate Court with costs.

Appeal decreed.

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February 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

LACHMI NARAIN AND ANOTHER (DEFENDANTS) v. UMAN DAT (PLAINTIFF)*

Act No. IV of 1882 *(Transfer of Property Act), sections* 86 *and* 88—*Decree for sale on a mortgage—Rate of interest after date fixed for payment.*

Where a decree for sale on a mortgage gives interest after the date fixed by the decree for payments of the mortgage debt, it is not necessary that such interest should be at the contractual rate. *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (1) and *Sundar Koer* v. *Rai Sham Kreshen* (2) referred to.

THE only question raised in this appeal was as to the rate of interest allowable after the decree upon two mortgage bonds upon which a suit for sale had been brought. The bonds in suit provided for the payment of interest at the rate of 10½ per cent. per annum, with a condition that if the interest was not paid in the second year compound interest should be charged, and that this condition should remain in force until the whole amount was paid off. On the question of interest the lower Appellate Court (District Judge of Gorakhpur) found that, although compound interest was made payable, the rate of interest was not abnormal, and he allowed interest at the contractual rate until the date of payment. The judgment-debtors appealed to the High Court contending that, according to a recent ruling of the Privy Council, only interest at the usual Court rate should be granted after the date fixed by the decree for payment of the mortgage debts.

* Second Appeal No. 286 of 1906 from a decree of William Tudball, Esq., District Judge of Gorakhpur, dated the 8th of January 1906, modifying a decree of Munshi Achal Bihari, Subordinate Judge of Gorakhpur, dated the 28th of August 1905.

(1) (1898) I. L. R., 26 Calc., 89. (2) (1906) I. L. R., 34 Calc., 150.

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Babu *Parbati Charan Chatterji* and Babu *Satya Chandra Mukerji*, for the appellants.

Babu *Durga Charan Banerji* and Munshi *Gobind Prasad*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was a suit for sale of mortgaged property under two bonds. These bonds provided for the payment of interest at the rate of 10½ per cent per annum; with a condition that if the interest was not paid in the second year compound interest should be charged, and that this condition should remain in force until the whole amount was paid off. The learned District Judge, modifying the decree of the Court below as regards interest, allowed compound interest up to the date of realization. He says in the course of his judgment:—"As for the rate of interest to be allowed for the period subsequent to the date fixed for payment in the decree, I see no cause to decree any other than the contractual rate. It is true that it is compound interest, but the rate (10½ per cent. per annum) is not a high one, but is a little less than the prevalent rate (12 per cent. per annum). There was no harsh or unconscionable bargain and no hard case. The interest will therefore be the contractual rate up to the date of payment." It is contended on behalf of the defendants appellants that in view of the decision of their Lordships of the Privy Council in a recent case, interest should not be allowed over and above the Court rate after the date fixed for payment. In the case of *Rameswar Koer* v. *Mahomed Mehdi Hossein Khan* (1), Lord Hobhouse in delivering the judgment of their Lordships remarked as follows:—"The High Court founded their order on sections 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind (that is a suit for sale on a mortgage) should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization." It was understood in this Court from the language of this judgment that the Court in passing a decree upon a mortgage should ordinarily allow interest at the contractual rate up to the date of realization. In the recent case, however, of *Sundar Koer* v. *Rai Sham Krishen* (2) their Lordships, referring to the language used by Lord

(1) (1898) I. L. R., 26 Calc., 39. (2) (1906) I. L. R., 34 Calc., 150.

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Hobhouse in the case of *Rameswar Koer v. Mahomed Mehdi Hossein Khan*, observe that the Judicial Committee did not intend in that case to lay down that in passing a mortgage decree the Courts should allow interest at the contractual rate beyond the date fixed for payment by the decree. Lord Davey in delivering the judgment of their Lordships quotes the passage from the judgment of Lord Hobhouse, which we have cited, and observes :—"The expression 'up to the date of realization' may have been used *per incuriam*, or it may have meant 'the day fixed for realization,' as in fact it seems to have been understood by the reporter of the case in the Indian Law Reports as expressed in his marginal note (I.L.R., 26 Calc., 39). Their Lordships cannot have intended to say that sections 86 and 88 of the Transfer of Property Act indicate that interest at the mortgage rate should be paid up to the time of actual payment of the mortgage money to the mortgagee." Then later on, after expressing approval of the decree of the High Court in which 6 per cent. per annum interest only, and not the mortgage rate, was allowed after the date fixed for the payment of the mortgage debt, Lord Davey observes :—"In the present case their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend not on the contents of his bond but on the directions in the decree." In view of this statement of the law by their Lordships it is open to the Court in determining the interest which should be payable after the day fixed for payment in the decree to limit the interest to the Court rate if it so think fit. It therefore is open to us in this case to modify the decree of the lower appellate Court in regard to interest. The learned District Judge did not think that the case before him was such as to justify any reduction in the interest payable up to

realization and therefore gave interest at the contractual rate. We think under the circumstances of this case that after the date fixed by the decree for payment simple interest only should be allowed at the contractual rate, and not compound interest. To this extent we modify the decree of the lower appellate Court. The appellants have substantially failed in the appeal and must pay the costs.

Decree modified.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

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RAGHUBANS PURI (PLAINTIFF) *v.* JYOTIS SWARUPA AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 54—Rejection of plaint—Procedure—Plaint not to be rejected in part.

Held that under section 54 of the Code of Civil Procedure a Court cannot reject a plaint in part.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *W. K. Porter*, for the appellant.

Mr. *B. E. O'Conor*, the Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J., and BURKITT, J.—In the suit out of which this appeal has arisen the plaintiff asked for a declaration that a sale-deed, dated the 18th of October 1901, of property specified in the plaint, was void and claimed possession of the property detailed in that deed. He put in an alternative claim, that if the plaintiff was not entitled to possession of the buildings upon the land, a decree for possession of the land itself might be passed in his favour and the defendants ordered to remove the materials of the buildings and that the plaintiff might be put into possession of the land. He also asked for any other relief to which he might "in the ends of justice" be entitled.

It appears that some time between the years 1860 and 1866 the predecessor in title of the plaintiff leased at least a portion of the land in dispute to Mr. Frederic Wilson, the father and

* Second Appeal No. 535 of 1905 from a decree of L. G. Evans, Esq., District Judge of Saharanpur, dated the 23rd of March 1905, confirming a decree of S. P. O'Donnell, Esq., Subordinate Judge of Dehra Dun, dated the 19th of May 1904.

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predecessor in title of the defendant Charles Wilson. Upon this land buildings were erected and an extensive timber business was carried on therein. It is said that the buildings alone covered an area of about 18 bighas: Mr. Charles Wilson, the son of Mr. Frederic Wilson, succeeded his father in the ownership of the demised premises and sold to the defendant Babu Jyotis Swarupa his interest therein.

A number of issues were framed, but some of them were not tried under the following circumstances. The plaintiff in his examination under section 117 of the Code stated his inability to define the lands which were included in the lease. In consequence of this the learned Subordinate Judge passed an order on the 18th of September 1903 directing the plaintiff to amend his plaint by giving the boundaries of the land in excess of the 12 *kachha* bighas, which the plaintiff alleged was all that had been demised to Frederic Wilson, or by otherwise indicating sufficiently the excess land. The plaintiff stated his inability to do so, and the defendants also admitted the impossibility of giving the boundaries, but they did not admit that the extent of the area of the lease was only 12 bighas. The Court under these circumstances considered that it would be impossible to grant the alternative relief claimed by the plaintiff in his oral evidence under section 158, Civil Procedure Code, and ordered the suit to proceed on the other issues, and he adds as follows:—"The plaint so far as it claims this alternative relief in the general terms of paragraph 11 *(d)* will be held to be rejected under section 54, Code of Civil Procedure." Both Courts below found that the land which was demised to Mr. Frederic Wilson was demised to him on a permanent lease for building purposes and that he had erected permanent buildings on the land, and that he and his successors in title had continued to hold the land under the lease up to the present time.

The plaintiff appellant has appealed to this Court and raised a number of grounds of appeal, one being that the Court below was not justified under the provisions of section 54 in rejecting portion of the claim of the plaintiffs. That section only provides for the rejection of a plaint in the event of any of the matters specified in that section not being complied with. It does not justify the rejection of any particular portion of a plaint, as was the case here.

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The Court ought to have tried the issues which were framed, and if the plaintiff failed in his proofs to establish his claim then reject the claim. We think the plaintiff should have had an opportunity at the trial of establishing his case. We cannot therefore dispose of this appeal without having a determination of two of the issues which were framed by the Court of first instance. These issues are Nos. 1 and 4, and are as follows:—

"1. What were the boundaries and what was the extent of the land given by the plaintiff's predecessor to the father of defendant (2)?

"4. Did the defendant (2) sell to defendant (1) any excess area of land over and above that area which had been given by the zamindar to his father, and what are the boundaries and area of such excess?"

We remand these issues to the Court of first instance through the learned District Judge under the provisions of section 566 of the Code and direct that Court to take such relevant evidence as may be adduced by either side. On return of the findings the parties will have the usual ten days for filing objections.

Cause remanded.

Before Mr Justice Banerji and Mr. Justice Aikman.

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February 21.

RAM SARUP (PLAINTIFF) *v.* KISHAN LAL (DEFENDANT).*

Act (Local) No. II. of 1901 *(Agra Tenancy Act), sections* 20, 21 *and* 31—*Occupancy holding—Usufructuary mortgage—Act No. IX of* 1872 *(Indian Contract Act), section* 23.

An occupancy tenant executed a usufructuary mortgage of his occupancy holding, and then executed a kabuliat undertaking to pay rent for the mortgaged land. *Held* on suit by the mortgagee for rent under the terms of the kabuliat that the agreement between the parties was of a nature which, if permitted, would defeat the provisions of the Tenancy Act, 1901; that it was unlawful within the meaning of section 23 of the Contract Act, and void. *Harnandan Rai* v. *Nakcheds Rai* (1), *Banmali Pande* v. *Bisheshar Singh* (2), and *Madan Lal* v. *Muhammad Ali Nasir Khan* (3) followed.

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* Second Appeal No 6 of 1905 from a decree of H. Warburton, Esq., District Judge of Agra, dated the 15th of November 1905, confirming a decree of V. E G Hussey, Esq., Assistant Collector of 1st class of Mutra, dated the 28th of July 1904

(1) Weekly Notes, 1906, p 362. (2) (1906) I L, R., 29 All., 129
(3) (1906) I. L, R., 28 All., 696.

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IN this case the defendant, an occupancy tenant, executed, on the 21st of October 1902, a usufructuary mortgage of his occupancy holding in favour of the plaintiff. He then executed a kabuliat undertaking to pay rent to the plaintiff for the mortgaged land. The plaintiff sued on this kabuliat to recover rent for the year 1311 Fasli. The Court of first instance (Assistant Collector of the first class, Muttra) sustained the defendant's plea that the mortgage and the kabuliat were invalid and dismissed the suit, and this decree was on appeal upheld by the District Judge. The plaintiff appealed to the High Court.

Babu *Lakshmi Narain*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondent.

BANERJI, J.—This appeal arises out of a suit brought by the appellant to recover from the respondent arrears of rent. The respondent is an occupancy tenant. On the 21st of October 1902 he made a usufructuary mortgage of his occupancy holding to the plaintiff appellant, and then executed a kabuliat undertaking to pay rent for the mortgaged land. It is on the strength of this kabuliat that the present suit was brought. The suit was resisted upon the ground that under the provisions of the Agra Tenancy Act, No. II of 1901, the mortgage was void and that the plaintiff had no title to sue for rent. Both the Courts below have sustained this defence. The plaintiff appeals.

It is contended on his behalf that the mortgage made by the defendant respondent is not absolutely void, but is only voidable at the instance of the landlord, and that it is not open to the defendant to question its validity. In support of this contention reliance is placed upon the provisions of section 31 of the Act. It is clear from the provisions of sections 20 and 21 that a transfer of his holding or of any interest therein by an occupancy tenant is wholly forbidden, except in the case of a sub-lease as provided in the Act. The object of the Legislature manifestly was to declare that certain rulings of this Court in which it was held that an occupancy tenant could mortgage his right to occupy should no longer have any binding effect. The usufructuary mortgage in the present instance was therefore void under the provisions of section 21. It is true that section 31 lays down that

"every sub-lease or other transfer made by a tenant in contravention of the provisions of the Act shall be 'voidable' at the instance of the landholder, but it seems to me that the word 'voidable' was used, not in the sense in which that term is ordinarily used in law as distinguished from an agreement which is absolutely void, but in the sense that a transfer made in contravention of the provisions of section 21 may be avoided by the landholder in the manner provided in the section. It is also true that the Tenancy Act prescribes a limitation of one year from the date of the transfer for a suit for the cancellation of a transfer. But it may be that what the Legislature contemplated was that in the case of a landholder he might accept and recognize the transfer, but if he wished to repudiate it, he must do so at an early date and bring his suit within one year of the transfer. That, however, does not raise the inference that as against the transferor or any other person the transfer shall be deemed to be binding after the expiry of one year and even when the landholder has not chosen to avoid it. It is manifest from the scope of sections 20 and 21 that they were enacted in the interst as much of the tenant as of the landholder, and that the Legislature thought it fit to absolutely forbid a transfer by an occupancy tenant of his interests in his holding. That being so, if the mortgage in favour of the plaintiff be held to be valid, the object of the law would be defeated. As the agreement between the plaintiff and the defendant is of a nature, which, if permitted, would defeat the provisions of the Tenancy Act, it is unlawful within the meaning of section 23 of the Contract Act and is void. The object of the suit brought by the plaintiff is to enforce the mortgage made in his favour. If he were allowed to carry out that object, the provisions of the law, as enacted in section 21, would be rendered nugatory. In *Harnandan Rai* v. *Nakchedi Rai* (1) a usufructuary mortgagee who brought a suit for possession was held not entitled to do so, as section 20 of the Act "forbids the transfer of the interest held by occupancy tenants except under circumstances which do not exist in this case." Probably the learned Judges meant to refer to section 21. In *Banmali Pande* v. *Bisheshar Singh* (2) a usufructuary mortgagee

(1) Weekly Notes, 1906, p. 302. (2) (1906) I. L. R, 29 All., 139.

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of an occupancy holding, whose mortgage was executed after the passing of the Tenancy Act, sued to redeem a prior mortgage. It was held that the mortgage under which the plaintiff claimed was invalid and unlawful, and that he had acquired no right under it so as to entitle him to redeem the prior mortgage. I may also refer to the decision of our brother Richards in *Madan Lal* v. *Muhammad Ali Nasir Khan* (1) which was affirmed on appeal under section 10 of the Letters Patent on the 13th of December 1906, and which was cited with approbation in the case of *Banmali Pande* v. *Bisheshar Singh* referred to above. In my opinion the view taken by the Court below is correct and I would dismiss the appeal with costs.

AIKMAN, J.—I am of the same opinion. On the 21st of October 1902, that is, after the date upon which the Agra Tenancy Act 1901, came into force, the respondent Kishan Lal and his brother, who were occupancy tenants, executed a usufructuary mortgage of their holding in favour of the plaintiff appellant Ram Sarup. He relet the land to the respondent Kishan Lal and now sues to recover the arrears of rent from Kishan Lal. The Courts below have dismissed the claim of the plaintiff, and in my opinion they were quite right. The plaintiff is really asking the assistance of the Court to enforce an agreement, the consideration of which was unlawful, and which is therefore void. In my opinion the Courts cannot give the plaintiff such assistance. A transfer of an occupancy holding such as that made in favour of the plaintiff is clearly forbidden by the terms of the Tenancy Act. For the appellant reliance was placed on an expression in a judgment of my own in the case of *Lalu Ram* v. *Thakur Das* (2) where I said that it was "clear from section 31 of the Act that a sub-lease or an agreement to sublet made by a tenant in contravention of section 25 is not void but merely voidable at the suit of a landholder." This observation was unnecessary for the decision of the question then under consideration, as the sub-lease in that case was granted before the new Tenancy Act came into force. In the passage cited above I am of opinion that I attached undue weight to the use of the term "voidable" in section 31. I

(1) (1906) I. L. R., 28 All., 696. (2) Weekly Notes, 1905, p. 52.

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agree with my learned colleague in thinking that the expression was not intended to indicate that a transfer in contravention of the Act was merely voidable, as distinguished from void. The word "voidable" was, it seems to me, used in the sense indicated by my learned colleague. I agree in the order proposed.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

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November 12, 13.
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February 7.

DEPUTY COMMISSIONER OF KHERI REPRESENTING THE COURT OF WARDS (DEFENDANT) *v.* KHANJAN SINGH AND OTHERS (PLAINTIFFS)

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow]

Hindu Law—Alienation by widow—Legal necessity—Order for interest on decree in execution where decree did not allow interest—Sum for interest made part of consideration for sale deed—Res judicata—Decision in suit for pre-emption—Civil Procedure Code, section 13.

A Hindu widow in possession of her husband's immovable property for a widow's estate executed, on 22nd December 1868 a deed of sale of it in favour of a creditor of her husband under a decree, dated 12th July 1861. No future interest was allowed by that decree, but on 22nd October 1865 the decree holder in execution of it obtained from the Court of the Deputy Commissioner an order for interest on the decree, which order was however set aside by the Judicial Commissioner on 15th September 1869 on the ground that a Court executing a decree had no power to alter or add to it. The consideration for the deed of sale, which was executed whilst the order granting interest was in force, was made up of Rs. 7,080 the amount her husband was liable for under the decree, Rs. 5,638 for interest on the decree, and a sum of Rs 7,280 in cash. On 23rd December 1869 the plaintiff as reversionary heir of the husband brought a suit against the vendee for pre-emption, but that suit was dismissed on the ground that his right of pre-emption was not established. The widow died in 1894, and in 1899 the plaintiff brought the present suit for possession of the property and for mesne profits from her death. The defendants were the Deputy Commissioner as representing the Court of Wards, into whose charge the vendee's estate had come, and the purchaser from the Court of Wards of the greater portion of the property in suit. The defence was that the alienation was made for legal necessity, and that the suit was barred by the decision in the pre-emption suit, which operated as *res judicata*. Both Courts below found on the facts that the item of Rs. 7,080 was justified by legal necessity, and that the advance of the sum in cash as part of the consideration was not proved

Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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Held by the Judicial Committee that the defendants claiming as they did under the vendee, and standing therefore in no higher position than his, were not entitled to base a claim to the property upon an order made in the vendee's favour, but subsequently set aside: under the circumstances the doctrine of legal necessity could not be extended to the item for interest. There should be a decree for possession and for the balance of mesne profits after deducting the Rs. 7,080 for which the property was liable.

Held also that all that was in issue in the former suit was the right of pre-emption as to the widow's interest only in the property, and that the effect of the deed of sale on the reversion could not properly have been made a ground of attack in that suit; the present suit was therefore not barred by section 13 of the Civil Procedure Code.

APPEAL from a judgment and decree (May 29th, 1903) of the Court of the Judicial Commissioner of Oudh, which affirmed a judgment and decree (April 10th, 1901) of the subordinate Judge of Sitapur.

The suit out of which this appeal arose was instituted by Ajudhia Singh (now represented by his sons Parwan Singh, and Rustam Singh) and by his nephew Khanjan Singh for possession of certain villages being the separate share of one Kalka Bakhsh Singh in an estate called Mumtazpur in the Sitapur district. Kalka Bakhsh Singh died previous to 1863 leaving his mother Shiam Kunwar, and his widow Man Kunwar his next heir who succeeded to a Hindu woman's estate of inheritance. On the 20th July 1855, Kalka Bakhsh Singh and other sharers had, in consideration of a loan of Rs. 18,880-8 mortgaged their shares in the Mumtazpur estate to Raja Anrudh Singh of Oel, the mortgage deed providing for interest at 2 per cent. per mensem. In a suit on this mortgage Raja Anrudh Singh on 12th July 1861 had obtained a decree for Rs. 18,880-8 and half that amount (Rs. 9,440-4) as interest, in all Rs. 28,320-12, for which Kalka Bakhsh Singh was made liable for one-fourth. By the terms of that decree however no future interest was payable. In course of execution of the decree Raja Anrudh Singh on 22nd October 1866 obtained an order from the Deputy Commissioner of Kheri for interest on the amount decreed, which order was however eventually reversed by the Court of the Judicial Commissioner on 15th September 1869.

On 22nd December 1868 Man Kunwar and Shiam Kunwar executed a deed of sale of all the property in suit in favour of

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Raja Anrudh Singh, the consideration for which was recited to be Rs. 7,080 the amount of the one-fourth share for which Kalka Bakhsh Singh was liable under the decree of 12th July 1861; Rs. 5,638-5-9 on account of one-fourth share of interest under the decree, and Rs. 7,280 paid to the vendors in cash. On 23rd December 1869, Ajudhia Singh brought a suit against Raja Anrudh Singh to obtain possession of the property by pre-emption alleging that the deed of sale was collusive and that the property had been sold for a very inadequate price; but his suit was dismissed on 29th April 1870 on the ground that he had not established his right of pre-emption.

Man Kunwar died on 31st May 1894; and on the death of Raja Anrudh Singh the property in dispute came into the possession of his heir Raja Krishna Dat Singh, a minor, and was placed under the management of the Court of Wards, and on 26th August 1898 the Court of Wards sold all the property in suit (with the exception of a village called Majhgawan) to Jawahir Singh the second defendant.

On 21st February 1899, the present suit was brought by Ajudhia Singh, claiming the property as the next heir of Kalka Bakhsh Singh: Khanjan Singh his nephew joining him as co-plaintiff on the ground that they were both members of an undivided Hindu family. The defendants were the Deputy Commissioner of Kheri as manager of the Court of Wards representing the Oel estate, and Jawahir Singh his vendee. The plaint stated the above facts and alleged that the sale deed dated 22nd December 1868 was obtained by fraud and collusion; that the only interest conveyed by it was the life-interest of the widow Man Kunwar, on whose death the possession of her transferees became unlawful; that the amount of the decree of 12th July 1861 which formed part of the consideration for the deed of sale carried no interest, the only liability of Kalka Bakhsh Singh under the decree being Rs. 7,080; that that sum had been paid up from the profits of the property, but if it should be found that it had not been so paid the plaintiffs were ready to have it deducted from the amount of mesne profits or pay it in cash. The plaintiffs claimed to be entitled to possession of the property and Rs. 9,545 as mesne

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profits, and prayed for that, and for further and other relief if necessary.

The Deputy Commissioner of Kheri in his written statement denied that Ajudhia Singh was the next reversioner; and alleged that the deed of sale of 22nd December 1868 was executed by Man Kunwar and the money borrowed for legal necessity, namely, to pay a debt of her husband's and for litigation in which his estate was concerned; that the suit for pre-emption brought by Ajudhia Singh against Raja Anrudh Singh estopped the plaintiffs from advancing the present claim both under section 115 of the Evidence Act (I of 1872), and section 13 of the Code of Civil Procedure (Act XIV of 1882), and that the suit was barred by limitation.

The purchaser defendant set up in addition to the above defences that the possession of Man Kunwar was adverse to the plaintiffs; and that there was no cause of action against him as a *bonâ fide* purchaser of the property from the Court of Wards.

The Subordinate Judge held that Ajudhia Singh was the next reversioner on the death of Man Kunwar; that Man Kunwar had not acquired a title by adverse possession; that the suit for pre-emption was not a *res judicata*; and that the suit was not barred by limitation, the cause of action having arisen on the death of Man Kunwar. As to whether the sale was binding on the reversioner he found that the sum of Rs. 7,280 said to have been paid in cash, was never paid at all and there was no legal necessity shown for borrowing it; that there was no interest payable under the decree of 12th July 1861; that Man Kunwar was under a legal obligation to pay the principal sum due under that decree, Rs. 7,080, even if it was barred by limitation; that Jawahir Singh the purchaser defendant was not a *bonâ fide* purchaser for value without notice of the plaintiff's claim; and that even if he were he had no better title than Raja Anrudh Singh. In the result he decided that the plaintiffs were entitled to possession of the villages in suit and to mesne profits subject to a liability for Rs. 7,080, and as the mesne profits exceeded that sum he set off the one amount against the other and made a decree for possession of the villages and for payment of the balance of the mesne profits.

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These findings and this decree were affirmed by the Court of the Judicial Commissioner (Mr. Ross SCOTT and Mr. G. T. SPANKIE.)

On this appeal,

Cohen, K.C. and *G. E. A. Ross,* for the appellant contended that it was not proved that Ajudhia Singh was, on the death of Man Kunwar, the nearest reversioner to the estate of Kalka Bakhsh Singh, and he had not therefore shown that he was entitled to maintain the present suit. Reference was made to Mayne's Hindu Law, 7th edition, para. 647, pages 847, 848; para. 646, page 871; 6th edition, paras. 634, 635, 636, pages 827, 829, 831, and para. 641, page 839. The sale would not be absolutely void. *Isri Dut Koer* v. *Hanshutti Koerain* (1) and *Modhu Sudan Singh* v. *Rooke* (2) were referred to. When the deed of sale was executed the order of the Deputy Commissioner allowing interest on the decree of 12th July 1861 was in force. Interest was therefore rightly charged and formed part of the consideration for the sale deed, and the appellate Court was wrong in not so treating it. That there was legal necessity the respondents were now estopped from denying. By bringing a suit for pre-emption Ajudhia Singh had admitted its validity and could not now dispute it, so that it was unnecessary to prove the existence of debts and the necessity for the sale. The decision in that suit was *res judicata* under section 13 of the Code of Civil Procedure, as the question of the invalidity of the sale might have been raised in that suit: the present suit was therefore barred.

De Gruyther for the respondents (other than the purchaser) contended that both the Lower Courts concurred in finding that Ajudhia Singh was the next heir to Kalka Bakhsh Singh on the death of Man Kunwar, and as such was entitled to sue. Both Courts had also held that there was no legal necessity for the sale except as to Rs. 7,080, the amount of the decree of 12th July 1861, and the appellant had been credited with that amount. The order giving interest on that decree was absolutely illegal, and was reversed on that ground. The suit for pre-emption created no estoppel, nor was the decision in that suit *res judicata*

(1) (1883) L. R., 10 I. A., 159. I. L. R., 10 Calc., 824.

(2) (1897) L. R., 24 I. A., 164: I. L. R., 25 Calc., 1.

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in the present suit. All that was decided there was that Ajudhia Singh had not established any right of pre-emption. Any objection to the sale in the pre-emption suit could only have been so far as Man Kunwar's life interest in the property was concerned. The respondent's objection now is that the sale was not valid after her death, which was a ground that could not properly have been raised in the pre-emption suit. The defendant Jawahir Singh was a purchaser from the Court of Wards and could not, it was submitted, have any better title than his vendor the appellant.

Cohen, K. C. replied.

1907, *February 7th.*—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

The case out of which this appeal arises relates to an alienation by a Hindu widow of property which had belonged to her husband.

The properties in dispute formed a part of the estate of Kalka Bakhsh, who died in or before 1868, without male issue, leaving as his heir his widow Man Kunwar, who took as such heir the estate of a Hindu widow.

During the life-time of Kalka Bakhsh, on the 12th July 1861, a decree based upon a mortgage was passed against Kalka Bakhsh and others, in favour of Raja Anrudh Singh, for a sum of Rs. 28,320-12, principal and interest, payable in two instalments, interest subsequent to the decree being disallowed. Kalka Bakhsh's share of liability under this decree became ascertained at Rs. 7,080.

Proceedings were subsequently taken to execute the decree, and on the 22nd October 1866, the then Deputy Commissioner of Kheri, before whom the execution was in progress, made a decree or order, allowing in favour of the judgment creditor, what the decree had not given him, interest subsequent to decree at the rate of 2 per cent. per mensem from the due dates of the several instalments. But after some intermediate proceedings, on the 15th September 1869, that decree or order was set aside by the Court of the Judicial Commissioner of Oudh, on the ground that the Court executing a decree has no power to alter or add to it.

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In the interval between the making of the decree or order of the 22nd October 1866, and its reversal on the 15th September 1869, the sale deed now in question was executed. It was dated the 22nd December 1868. It was executed by the widow Man Kunwar, and by her late husband's mother. It was in favour of the same Raja Anrudh Singh, who had obtained the decree of the 12th July 1861. The consideration alleged was made up of three parts: first, the Rs. 7,030 due under the decree of the 12th July 1861; secondly, interest on that sum subsequent to the date of the decree; thirdly, a fresh advance said to have been made in cash of Rs. 7,280.

Man Kunwar died on the 31st May 1894, whereupon the estate of her husband passed to his then next male heir, Ajudhia Singh. And on the 21st February 1899 Ajudhia Singh, (with another who need not be further noticed) instituted the present suit in the Court of the Subordinate Judge of Sitapur. The defendants were, first, the Deputy Commissioner of Kheri, as Manager for the Court of Wards in charge of the estate which had been that of Raja Anrudh Singh, and, secondly, Thakur Jawahir Singh, a purchaser from the Court of Wards of the greater part of the property in dispute. The claim was to recover the property as from the death of Man Kunwar, with mesne profits.

Various defences to the suit were raised, but only two were urged on the argument of the appeal before their Lordships; first, that the sale in question was justified by necessity, and on this ground was effectual to pass the whole interest of Man Kunwar's husband in the property, not merely her widow's estate; secondly, that the suit was barred by section 13, explanation II, of the Civil Procedure Code.

The Subordinate Judge made a decree in favour of the plaintiffs for possession and mesne profits. He allowed the defendants credit in account for Rs. 7,080, the amount due under the decree of the 12th July 1861, but disallowed the other two portions of the alleged consideration for the sale. He decided against the defendants with regard to the suggested bar by section 13 of the Civil Procedure Code. The Judicial Commissioners of Oudh, on appeal, agreed with the Subordinate Judge and affirmed his

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decree. That is the decision now appealed against by the first defendant, the Deputy Commissioner of Kheri.

With regard, in the first place, to the defence of necessity, it is not disputed that such necessity existed in respect of the first item of consideration, Rs. 7,080, the amount due under the decree of the 12th July 1861, and for this amount the appellant has received credit. As to the third item of consideration, the alleged fresh advance of Rs. 7,280, both Courts in India have found that there was no evidence of necessity for such an advance, if it ever was made; and their Lordships agree.

The argument really turned upon the second item, the interest after decree upon the decree of the 12th July 1861. The contention was that inasmuch as the decree or order of the 22nd October 1866, granting interest on the amount decreed in 1861, was in force when the conveyance in question was executed, the doctrine of necessity extended to the interest.

It is not necessary to inquire what the result would have been, if some outsider had advanced money to the widow, in order to protect the estate against a claim by Raja Anrudh Singh to realize the interest awarded to him by the decree or order of the 22nd October 1866. The question that does arise is, whether those who claim under the Raja, and whose position is no higher than his, are entitled to base a claim to the property in question upon a decree or order originally made in the Raja's favour, but subsequently set aside. Their Lordships agree with the Courts in India that the claim of the appellant on this ground cannot be supported.

The contention based upon section 13 of the Civil Procedure Code arises out of the following circumstances. After the sale by Man Kunwar to Raja Anrudh Singh, Ajudhia Singh, on the 23rd December 1869, brought a suit against the Raja and others, in which the plaintiff claimed a right of pre-emption. The suit was dismissed on the ground that no right of pre-emption was proved. It is now contended that the ground of claim in the present suit is a matter which might and ought to have been made a ground of attack in that suit.

Their Lordships agree with the Courts in India in thinking that what was in question in that former suit was the right of

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pre-emption in respect of what Man Kunwar had power to convey and did convey, that is her widow's interest, and that the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of the suit.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Appeal dismissed.

Solicitor for the appellant—*The Solicitor, India Office.*

Solicitor for the respondents—*T. L. Wilson & Co.*

J. V. W.

FAIYAZ HUSAIN KHAN (DEFENDANT) v. PRAG NARAIN (PLAINTIFF) AND OTHERS (DEFENDANTS).

P. C. 1907 *February* 6, *March* 21.

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow].

Lis pendens—Contest between prior purchaser under a second mortgage and subsequent purchaser under a first mortgage—Second mortgage executed after institution of suit on first mortgage but before summons served—"Contentious" suit—Act No IV of 1882 (*Transfer of Property Act*), *section* 52.

The plaintiff was purchaser in execution of a decree based on a first mortgage of the property in suit. The defendant was in possession as a prior purchaser in execution of a decree on a second mortgage of the same property, passed in a suit to which the first mortgagee was not made a party. The second mortgage was executed after the institution of the suit on the first mortgage but before the summons had been served. *Held* that the doctrine of *lis pendens* applied, and that the plaintiff had the better title.

Where a suit is contentious in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a "contentious" one within the meaning of section 52 of the Transfer of Property Act (IV of 1882) and render the doctrine of *lis pendens* applicable.

Irrespective of the doctrine of *lis pendens* it appeared from the circumstances of the case that the defendant was cognizant of the first mortgage, of the decree made on the basis of it and of the sale proceedings which took place in execution of the decree.

APPEAL from a decree (August 10th, 1904) of the Court of the Judicial Commissioner of Oudh, which affirmed a decree (July 4th, 1903) of the Court of the Subordinate Judge of tahsil Biswan in district Sitapur.

Present :—Lord MACNAGHTEN, Lord DAVEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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The main question on this appeal was whether the appellant or the respondent had acquired a prior title to a village called Bangawan under purchases in execution of decree.

The village in suit was owned by one Hamid Husain Khan, who on 14th June 1889 executed a mortgage of it in favour of one Newal Kishore the predecessor in title of the respondent Prag Narain in consideration of a loan of Rs. 3,000 with interest. The mortgagor failing to pay as stipulated in the mortgage deed, Newal Kishore, on 13th July 1891, brought a suit in the Court of the Subordinate Judge of Sitapur to recover the amount due on the mortgage by sale of the mortgaged property in accordance with section 88 of the Transfer of Property Act (IV of 1882), and on 23rd August 1892 obtained a decree which directed sale of the mortgaged property in default of payment of the mortgage money on or before 23rd February 1893. An order absolute for sale was made on 29th November 1895 under section 89 of Act IV of 1882. The summons in that suit was not served on Hamid Husain Khan until September 12th, 1891.

Meanwhile, on 15th July 1891, Hamid Husain Khan mortgaged the village to the respondent Muzaffar Beg, who sued on the mortgage and obtained a decree for sale, which was made absolute in January 1897. To that suit Newal Kishore ought to have been, but was not, made a party.

Proceedings in execution were taken under the decree in Newal Kishore's suit, which resulted in an order directing the village to be sold on 20th July 1898. Faiyaz Husain Khan on 16th July 1898 brought a suit against Prag Narain (as representative of Newal Kishore then deceased) and against the mortgagors in the Court of the Subordinate Judge of Sitapur for a declaration that the village was not liable to attachment and sale as the mortgagors had no transferable interest therein: and he obtained a postponement of the sale pending the decision in his own suit which was finally dismissed on appeal by the Court of the Judicial Commissioner on 3rd January 1900.

On December 20th, 1900, the village was sold in execution o Muzaffar Beg's decree and purchased by the appellant Faiya, Husain Khan (son of the mortgagor Hamid Husain Khan), who succeeded in getting possession, and on 21st February 1901 the

village was again sold in execution of Newal Kishore's decree and purchased by Prag Narain, who had succeeded Newal Kishore as decree-holder, the sale on the earlier mortgage thus taking place after the sale on the later mortgage.

In pursuance of his purchase of 21st February 1901, the plaintiff endeavoured to obtain possession of the village, and being resisted, he instituted the present suit, on 2nd October 1902, for possession, making Faiyaz Husain Khan, Hamid Husain Khan, and Muzaffar Beg defendants. Of these Hamid Husain Khan did not enter appearance and the defence of Muzaffar Beg was found by both the Courts below to be groundless. Faiyaz Husain Khan claimed priority under his prior purchase, and of the five issues the only one now material was the fourth—"whether defendants are bound by the sale held in plaintiff's favour ?"

On this issue the Subordinate Judge held that the defendant Faiyaz Husain Khan as prior purchaser in an execution sale under a mortgage decree had priority over the plaintiff as a subsequent purchaser ; but that the sale to Faiyaz Husain Khan was void under section 52, Act IV of 1882, on the ground that the mortgage dated 15th July 1891 had been executed after the institution of Newal Kishore's suit to enforce his mortgage of 14th June 1889. On this finding the Subordinate Judge made a decree in favour of the plaintiff for possession and mesne profits.

The Court of the Judicial Commissioner on appeal (E. CHAMIER, Officiating Judicial Commissioner and W. F. WELLS, Additional Judicial Commissioner) affirmed the decision of the Subordinate Judge. Mr. Chamier, delivering the judgment of the Court, in which Mr. Wells concurred, remarked :—

"I am disposed to hold the rule of *lis pendens* applies to this case, notwithstanding that the mortgage to Muzaffar Beg was made before the service of the summons on the mortgagor in the first mortgagee's suit. But, whether that is a correct view or not, I hold that a purchaser at a sale held in execution of a decree for sale on a first mortgage made by a person in possession of the property, the decree having been obtained in a suit brought in strict accordance with section 85 of Act IV of 1882, is entitled to possession as against a purchaser at a sale held in execution of a

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decree for sale obtained in a suit brought on a second mortgage in defiance of the rule laid down in that section.

"Prag Narain purchased the rights of the mortgagor as they were at the date of the first mortgage and there can be no doubt that the mortgagor was then entitled to possession. The cases of *Hargu Lal Singh* v. *Gobind Rai* (1) and *Madan Lal* v. *Bhagwan Das* (2) in which purchasers at sales held in execution of a decree on a first mortgage were held to be not entitled to possession are distinguishable upon the ground that the decrees obtained by the first mortgagees in those suits were not binding on the persons in possession who, or whose predecessors in interest, ought to have been joined as parties to the suit on the first mortgage. There is no reported case that I am aware of which supports the contention of the appellant in the present suit. It appears to me that if we were to accept the appellant's contention in the present suit there might be no limit to the number of suits required to enforce a first mortgage. Assuming, without deciding, that the appellant Faiyaz Husain can now redeem the first mortgage, I think that he should not be allowed to do so in the present suit; first, because he did not offer to do so in the Court below and his conduct has in other respects been such as to disentitle him to any consideration, and, secondly, because there remains not only the question whether Faiyaz Husain can redeem the first mortgage, but also the question whether Prag Narain cannot also in turn redeem the second mortgage (see *Hassanbhai* v. *Umaji* (3). The latter question has not been considered at all and no argument was adduced to us upon it. Moreover the materials on the record are not sufficient to enable us to make up the requisite accounts and pass a decree which will settle the question between the parties. I would dismiss the appeal with costs."

On this appeal *G. E. A. Ross* for the appellant contended that the doctrine of *lis pendens* did not apply to the case because, although the execution of the mortgage of 15th July 1891 was subsequent to the institution of Newal Kishore's suit, that suit did not become a contentious one within the meaning of section 52 of Act IV of 1882 until the service of the summons, which

(1) (1897) I. L. R., 19 All., 541. (2) (1899) I. L. R., 21 All., 236.
(3) (1903) I. L. R., 28 Bom., 153.

took place two months after the mortgage had been executed: there was therefore no *lis pendens* at the date of the mortgage. Reference was made to *Radhasyam Mohapattia* v. *Sibu Panda* (1); *Parsotam Saran* v. *Sanehi Lal* (2) *Abboy* v. *Aunamalai* (3), Transfer of Property Act (IV of 1882), section 52; Coote's Law of Mortgages, Volume II, 1344; Fisher on Mortgages, 5th ed., 533, para. 1119; Hukum Chand's Law of Res judicata 694, 695, Section 274; *Leitch* v. *Wells* (4) and *Dawson* v. *Mead* (5). The respondent had therefore, it was submitted, not made out any claim to possession of the property in dispute. Even assuming he had done so, the application of the appellant to be allowed to redeem should have been granted.

De Gruyther for the respondent contended that the sale to the appellant was void so far as the respondent was concerned under the general doctrine of *lis pendens*, and also under section 52 of Act IV of 1882. Newal Kishore's suit was contentious in its nature, and it was not necessary for a summons to be served on the defendant in order to make it a contentious suit within the meaning of section 52 of Act IV of 1882. Newal Kishore's suit was pending at the time the mortgage of 15th July 1891, under which the appellant claimed, was executed, and therefore the result of the suit could not be affected by the sale to the appellant under the decree on that mortgage.

It was also contended that the respondent as a purchaser in execution of a decree based on a first mortgage had a better title than the appellant who was a prior purchaser in execution of a decree based on a second mortgage to which the first mortgagee was no party. Besides, the appellant knew all the circumstances of Newal Kishore's mortgage and of the proceedings taken to enforce it, as was shown by his suit in 1898, to have the mortgage and decree passed on it declared invalid.

The application of the appellant to be allowed to redeem was rightly refused by the High Court. Had he in due course and within the proper time for doing so taken the necessary steps for redemption, his application to redeem might have been considered, but there was nothing for him to redeem after the

(1) (1888) I. L. R., 15 Calc., 647. (3) (1888) I. L. R., 12 Mad., 180
(2) (1899) I. L. R., 21 All., 408. (4) (1872) 48 New York Reports, 585 (611).
(5) 71 Wisconsin Reports, 295.

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confirmation of the sale to the respondent. The Transfer of Property Act (IV of 1882), sections 83 and 85 were referred to.

Ross replied.

1907, *March 21st*.—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

This is an appeal from the Court of the Judicial Commissioner of Oudh, which affirmed a decision of the Subordinate Judge of Sitapur.

Leave to appeal was granted on the ground that the appeal involved a substantial question of law. What the question was that was supposed to be involved is, however, left somewhat in obscurity.

The facts are not in dispute.

On the 14th of June 1889 Hamid Husain, the owner of Mauza Bangawan, mortgaged it to Newal Kishore.

On the 13th of July 1891 Newal Kishore brought a suit on his mortgage.

On the 23rd of August 1892 he obtained a decree for sale which was made absolute on the 29th of November 1895.

On the 21st of February 1901 the property was sold in execution of Newal Kishore's decree and purchased by the respondent Prag Narain, who was the son and the representative of the decree-holder.

On the 2nd of July 1901, Prag Narain obtained a sale certificate and attempted to recover possession of the property. He was, however, obstructed in every possible way by the appellant Faiyaz Husain, who was in possession under a decree for sale obtained on a subsequent mortgage. Prag Narain was therefore compelled to bring this suit.

There was no incumbrance upon the property either at the date of the mortgage of the 14th June 1889 to Newal Kishore or at the date of the institution of Newal Kishore's suit on the 13th of July 1891. But on the 15th of July 1891, before any summons in Newal Kishore's suit was served, a second mortgage was granted by the mortgagor to Mirza Muzaffar Beg. Mirza Muzaffar Beg put his mortgage in suit on the 20th of March 1894, without making the first mortgagee a party, and in the

absence of the first mortgagee obtained a decree for sale. In execution of this decree the property mortgaged to Mirza Muzaffar Beg was put up for sale on the 20th of December 1900 and bought by the appellant Faiyaz Husain, who was the son of Hamid Husain, and who had attained his majority in 1894. Faiyaz Husain managed to get possession and resisted all attempts on the part of the respondent Prag Narain to dispossess him.

The case seems to their Lordships to be clear. The mortgage to Mirza Muzaffar Beg was made during the pendency of Newal Kishore's suit, which was in its origin and nature a contentious suit and was at the time being actively prosecuted. Therefore, under section 52 of the Transfer of Property Act (No. IV of 1882) it did not affect the rights of Newal Kishore under the decree made in his suit. Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of section 52 of the Act of 1882 until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty.

The doctrine of *lis pendens* with which section 52 of the Act of 1882 is concerned, is not, as Turner, L.J. observed in *Bellamy* v. *Sabine* (1), "founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is . . a doctrine common to the Courts both of law and of equity, and rests . . . . upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail." The correct mode of stating the doctrine, as Cranworth, L.C., observed in the same case, is that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent."

Apart, however, from the doctrine of *lis pendens*, which seems to their Lordships to apply to the present case, it is plain that at the date of his purchase Faiyaz Husain knew all about the mortgage to Newal Kishore and the decree made on the basis of

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that mortgage, and he knew that the sale proceedings were actually in progress, for in July 1898 he brought a suit against Prag Narain, asking for a declaration that Newal Kishore's mortgage, and the decree passed upon it, were invalid, and that the property was not liable for attachment and sale.

At the hearing of the appeal to the Court of the Judicial Commissioner Faiyaz Husain asked to be let in to redeem. The Court very properly rejected that application. It has been repeated at the hearing before this Board. There seems to be no ground for the application. Before the sale to Prag Narain was confirmed, Faiyaz Husain had every opportunity of redeeming the property. He never offered to do so. On the sale being confirmed the equity of redemption was extinguished. Prag Narain appears to be in as good a position as any outside purchaser unconnected with the property would have been. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant—*T. L. Wilson & Co.*

Solicitors for the respondent—*Barrow, Rogers, & Nevill.*

J. V. W.

APPELLATE CIVIL.

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January 21.

Before Mr. Justice Sir George Knox and Mr. Justice Richards

THE MUNICIPAL BOARD OF NAJIBABAD (PLAINTIFF) *v.* SHEO NARAIN (DEFENDANT)*

Act (Local) No. I of 1900 (*N-W P. and Oudh Municipalities Act*) *section* 47—*Contract*—*Mode of execution by Board.*

Where a contract entered into with a Municipal Board for the supply of material for road-making was endorsed both by the Secretary and the Vice-Chairman of the Board and this endorsement referred to the contents of the contract and its confirmation: *Held* that this was a sufficient compliance with the requirements of section 47 of the Municipalities Act.

THIS was a suit brought by the Municipal Board of Najibabad for damages for breach of a contract entered into by the

*Second Appeal No. 1142 of 1905, from a decree of C. H. Berthoud, Esq., Additional Judge of Moradabad, dated the 5th of August 1905, reversing a decree of Maulvi Muhammad Shafi, Additional Subordinate Judge of Moradabad, dated the 28th of September 1904.

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defendant with the Board for the supply of kankar for road-making. The Court of first instance (Additional Subordinate Judge of Moradabad) decreed the plaintiffs' claim in part. On appeal the Additional District Judge of Moradabad dismissed the suit on the ground that the contract sued upon had not been executed on behalf of the Board in the manner prescribed by section 47 of the Municipalities Act, 1900. Against this decision the plaintiff appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Babu *Parbati Charan*, for the respondent.

KNOX and RICHARDS, JJ.—This appeal arises out of a suit brought by the Municipal Board of Najibabad through the Chairman of the Board against one Sheo Narain, who, according to the allegations made in the plaint, had entered into a contract for storing and consolidating kankar with the Municipal Board. The plaint states that the respondent had not carried out the terms of the contract, which caused loss to the Board, hence the suit for damages. The Court of first instance decreed the claim. The respondent before us appealed to the lower appellate Court. There were no less than eighteen grounds in the memorandum of appeal, but the lower appellate Court decided the appeal upon a preliminary point which is neither contained in, nor covered by, the written statement of the respondent or the memorandum of appeal to the lower appellate Court. The point seems to have been suggested by a ruling of this Court in *Radha Kishan Das* v. *The Municipal Board of Benares* (1) namely, that the contract was not signed by the Chairman or a Vice-Chairman and the Secretary. The Municipal Board of Najibabad were evidently taken by surprise and one of the grounds in appeal to us is that the raising of this new plea should not have received the permission of the Court. The learned District Judge and the parties appear to have assumed that the formalities insisted on in section 47 of the Municipalities Act had been disregarded. Upon this point he dismissed the claim brought by the Municipality. In appeal before us it is contended that there was sufficient compliance with the provisions of section 47 of the Municipalities Act, as the resolution sanctioning

(1) Weekly Notes, 1905, p. 111.

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the agreement is signed by the Chairman and the Secretary. We allowed time for the production of the resolution and the contract. It was then discovered that the contract was on the file. We have examined it. We find that it is signed by the defendant, and on the back are endorsed the signatures of both the Secretary and the Vice-Chairman, and this endorsement refers to the contents of the contract and its confirmation. In our judgment this is a sufficient compliance with the requirements of section 47 of the Municipalities Act. We decree the appeal, set aside the decree of the lower appellate Court on this preliminary point, and direct that Court to re-admit the appeal upon its file of pending appeals and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

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January 31

SHEODIHAL SAHU (PLAINTIFF) v BHAWANI (DEFENDANT).*

Civil Procedure Code, sections 244 and 583—Possession of property taken without intervention of Court—Decree reversed on appeal—Suit for restitution—Discretion of Court

In a suit for redemption the plaintiff obtained a decree and took possession of the property in suit without the intervention of the Court. The decree, however, having been reversed on appeal, the defendant brought a regular suit to recover possession of the mortgaged property. *Held* that a regular suit was precluded by the provisions of sections 244 and 583 of the Code of Civil Procedure, but the Court of first instance would have exercised a proper discretion if it had treated the plaint as an application under section 583 of the Code. *Dhan Kunwar* v. *Mahtab Singh* (1) and *Saran* v. *Bhagwan* (2) referred to.

THE facts which gave rise to this appeal are as follows. One Musammat Bhawani executed a mortgage of certain property in favour of Sheodihal Sahu. She subsequently sued for redemption, and obtained a decree on the 23rd of September 1901. This decree was not put into execution, but the mortgagor took

* Second Appeal No 14 of 1906 from a decree of W. R. G. Moir, Esq., District Judge of Jaunpur, dated the 2nd of November 1905, confirming a decree of Maulvi Syed Zainul-abdin, Subordinate Judge of Jaunpur, dated the 8th of March 1905.

(1) (1898) I. L. R. 22 All., 79 (2) (1903) I. L. R. 25 All., 441.

possession of the mortgaged property without the intervention of the Court on the day after the decree was passed. The mortgagee, however, appealed against the decree for redemption and the decree was reversed, and this decree was affirmed in second appeal by the High Court. The mortgagee thereupon instituted a suit against the mortgagor to recover possession of the mortgaged property. Both the Court of first instance (Subordinate Judge of Jaunpur) and the lower appellate court (District Judge of Jaunpur) dismissed the suit holding that it was barred by the operation of sections 244 and 583 of the Code of Civil Procedure. Both Courts declined to treat the plaint as an application under section 583 of the Code. The plaintiff appealed to the High Court.

Pandit *Moti Lal Nehru*, and Maulvi *Ghulam Mujtaba*, for the appellant.

Dr. *Satish Chandra Banerji* and Babu *Sital Prasad Ghosh*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This appeal has been preferred under the following circumstances. The defendant Musammat Bhawani executed a mortgage in favour of the plaintiff of certain property. She subsequently sued for redemption and obtained a decree on the 23rd of September 1901. She did not put the decree into execution, but took possession of the mortgaged property without the intervention of the Court on the day after the decree was passed. An appeal against the decree was preferred and the decree was reversed. On second appeal to the High Court the decree of the lower appellate Court was affirmed. Thereupon the plaintiff appellant before us instituted a suit for recovery of the mortgaged property of which Musammat Bhawani had taken possession without the intervention of the Court. In the Court of first instance the plaintiff, to meet the defendant's objection that the claim was barred by sections 244 and 583 of the Code of Civil Procedure, asked the Court, in the event of it holding that these sections were fatal to the suit, to treat the plaint as an application under them for restitution of the property. The Court of first instance dismissed the plaintiff's claim on the ground that it was barred by the sections to which we have referred. On appeal the lower appellate Court upheld the

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decision of the Court of first instance and stated as regards the application to have the plaint treated as an application under section 244 and section 583 that "the Court might have so admitted it had the appellant allowed that no regular suit lay; but the appellant has contested this point up to the appellate Court." On this account the learned District Judge considered that it would have been improper for the lower Court, and still more so for him, to treat the plaint as an application.

An appeal has now been preferred to this Court, and the main grounds of appeal are that sections 244 and 583 do not stand in the way of a suit; that section 583 does not bar the institution of a regular suit, and that in any case if these sections are applicable, the Judge ought to have treated the plaint as an application under them. We are disposed to think that the sections in question do forbid a suit such as the present one By the language of section 244 a suit is prohibited. Although there is no express prohibition against the institution of a suit for recovery of property by way of restitution or otherwise contained in section 583, still the language of that section, coupled with the prohibition in section 244, appears to be imperative The words are:—"When a party entitled to any benefit by way of restitution or otherwise under a decree passed in an appeal desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal according to the rules prescribed for the execution of decrees in suits" This apparently is the view which was taken by the learned Judges of this Court who decided the cases of *Dhan Kunwar* v. *Mahtab Singh* (1) and *Saran* v. *Bhagwan* (2). We think, however, that in the present instance at all events the Courts below ought to have acceded to the request of the plaintiff appellant and treated the plaint as an application under the sections to which we have referred. The reason assigned by the learned District Judge for his refusal to entertain this application does not appear to us to be reasonable. We therefore allow this appeal, set aside the decrees of both the lower Courts and remand the suit to the

(1) (1899) I. L. R. 22 All., 79. (2) (1903) I. L. R. 25 All., 441

Court of first instance through the learned District Judge under section 562 of the Code of Civil Procedure, with directions that the plaint be treated as an application under sections 244 and 583 and be disposed of on the merits. Costs here and hitherto will abide the event.

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Appeal decreed and cause remanded.

APPELLATE CRIMINAL.

1907 *February* 15.

Before Mr Justice Banerji

EMPEROR v. CHEDA LAL.*

Act No XLV of 1860 (*Indian Penal Code*), *section* 192 — *Fabricating false evidence—Definition*

One Cheda Lal, whose brother Debi was an accused person, applied to the Court on behalf of the accused asking that the witnesses for the prosecution might first of all be made to identify Debi. The Court assenting to this request, Cheda Lal produced before the Court ten or twelve men, none of whom could be identified as Debi by any of the prosecution witnesses. Upon being asked by the Court where Debi was, Cheda Lal pointed out a man who, upon further investigation, was discovered to be wearing a false moustache and to be not Debi at all, but one Chimman. *Held* upon these facts that Cheda was rightly convicted of fabricating false evidence having regard to the definition contained in section 192 of the Indian Penal Code.

THE facts of this case are as follows.—Debi, the brother of the appellant, was charged before a Deputy Magistrate, with enticing away a married woman. When the case was called on for hearing, an application was presented on behalf of Debi praying that the witnesses for the prosecution should first of all be made to identify him. A similar application was verbally made by the appellant Cheda Lal. The Deputy Magistrate granted the application and directed Cheda Lal to bring up Debi. Cheda Lal brought before the Deputy Magistrate, who was holding his Court in camp, ten or twelve men and said that Debi was one of them. The Deputy Magistrate, however, did not satisfy himself that the accused person was in fact before him. The men were ranged in a line and the witnesses were called in to identify Debi. All of them, including the woman said to have been enticed away, failed to do so. Thereupon the Deputy Magistrate asked the appellant Cheda Lal where Debi was. He

* Criminal Appeal No 1003 of 1906

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pointed to a man in the crowd, who upon being questioned also said that he was Debi. It was discovered that the man was wearing a false moustache and that he was not Debi, but Chimman. Debi was subsequently arrested and tried, Cheda Lal was convicted of having fabricated false evidence and sentenced to five years' rigorous imprisonment. Cheda Lal applied in revision to the High Court and it was contended on his behalf that the facts proved against him, if accepted, did not constitute the offence of fabricating false evidence

MR. *R. K. Sorabji*, for the appellant.

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown.

BANERJI, J.—The appellant Cheda Lal, has been convicted of the offence of fabricating false evidence and has been sentenced to five years' rigorous imprisonment.

The facts of the case, as established by the evidence, are somewhat peculiar. They are as follows:—Debi, the brother of the appellant, was charged before a Deputy Magistrate with enticing away a married woman. When the case was called on for hearing, an application was presented on behalf of Debi, praying that the witnesses for the prosecution should first of all be made to identify him. A similar application was verbally made by the appellant, Cheda Lal. The Deputy Magistrate granted the application and directed Cheda Lal to bring up Debi. Cheda Lal brought before the Deputy Magistrate, who was holding his Court in Camp, ten or twelve men and said that Debi was one of them. The Deputy Magistrate, however, did not satisfy himself that the accused person was in fact before him The men were ranged in a line and the witnesses were called in to identify Debi. All of them, including the woman said to have been enticed away, failed to do so. Thereupon the Deputy Magistrate asked the appellant, Cheda Lal, where Debi was. He pointed to a man in the crowd, who, upon being questioned, also said that he was Debi. It was discovered that the man was wearing a false moustache and that he was not Debi, but Chimman. Debi was subsequently arrested and tried. For the part which Cheda Lal took in this farce he has been convicted, as stated above, of having fabricated false evidence and sentenced to five years' rigorous imprisonment. It is

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contended by the learned counsel who has appeared on behalf of Cheda Lal that his offence did not amount to that of fabricating false evidence. I must confess that at the hearing this argument seemed to me to be well founded, but after giving the matter my best consideration, I am of opinion that Cheda Lal is guilty of fabricating false evidence. The essential elements of that offence, as defined in section 192 of the Indian Penal Code, are:— (1) that the accused caused the existence of any circumstance; (2) that he intended that such circumstance might appear in evidence in a judicial proceeding, and (3) that so appearing in evidence, it might cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding. All these elements exist in the present case. Cheda Lal, by placing before the Magistrate a person who was not his brother Debi, and representing that he was Debi, caused a circumstance to exist. His intention was that the witnesses for the prosecution should not be able to identify the accused person in the case against Debi and that their failure to identify him should induce the Magistrate to disbelieve these witnesses. The identification of the accused by the witnesses for the prosecution or their failure to identify him is evidence of an important character bearing materially on the result of the trial. And it was certainly the intention of Cheda Lal that the failure of the witnesses to identify the accused should appear in evidence and mislead the Court, otherwise his conduct in enacting the farce which was enacted by him is inexplicable. Whether he could or could not succeed in carrying out his intention is immaterial. The gist of the offence did not consist in actually causing a failure of justice but in the intention to cause a failure of justice by misleading the Court, and with such intent causing the existence of any circumstance which might appear in evidence. In the present instance it was the placing before the Court of another man as Debi which constituted the first element of the offence. The putting of a false moustache on him was immaterial for the purposes of this case, especially as it appears that the real Debi had no moustache and the man substituted for him, whose name is Chimman, is very unlike him in many respects. It is, therefore,

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not surprising that the witnesses did not identify him and the Court was not in fact misled. Even if some of the witnesses had identified Chimman as Debi and had thus proved themselves to be false witnesses, that would not have affected the question of Cheda Lal's guilt, as it is his intention to mislead the Court, and not the actual result, upon which his guilt or innocence depends. For the above reasons I am of opinion that he has been rightly convicted under section 193 of the Indian Penal Code. He has also brought himself under the purview of other sections of the Code, but it is not necessary to go into that question. The sentence passed on him is, in my judgment, unduly severe, and I think the justice of the case would be sufficiently met by reducing it to one of two years' rigorous imprisonment. Whilst therefore I affirm the conviction, I alter the sentence to one of two years' rigorous imprisonment and to this extent allow the appeal. The appellant must surrender to his bail and serve out the remainder of his sentence.

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March 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

PARSOTAM RAO TANTIA AND ANOTHER (DEFENDANT) v. JANKI BAI (PLAINTIFF) AND RADHA BAI (DEFENDANT).*

Hindu law—Joint Hindu family—Self-acquired property—Devise of self-acquired property to sons—Nature of son's interest.

Semble that property which is the self-acquired property of a Hindu who has sons and grandsons and is devised by will to one of the owner's sons remains after devolution self-acquired property and does not become the joint property of the devisee and his sons. *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (1) followed *Tara Chand* v *Reeb Ram* (2), *Muddun Gopal Thakoor* v. *Ram Bukesh Pandey* (3) dissented from.

Semble also that, where the sons of a Hindu father, apparently members with their father of a joint Hindu family, took under their father's will property acquired by him under the will of his father, devised to them separately by name; but continued to live in the manner of a joint Hindu family and

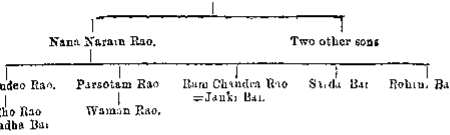
*First Appeal No. 53 of 1906, from a decree of Babu Prag Das, Subordinate Judge of Cawnpore, dated the 13th of February 1906.

(1) (1886) I. L. R., 10 Bom., 523. (2) (1866) 3 Mad. H. C. Rep., 50.
(3) (1883) 6 W. R., C. R., 71.

treated at all events the immovable property for a series of years in all respects as if it were joint ancestral property, the property so devised remained separate property according to Hindu law *Apporier* v. *Rama Subba Aiyan* (1) and *Balkishen Das* v *Ram Narain Sahu* (2) referred to.

THE connection between the parties to this litigation will appear from the following genealogical table :—

RAM CHANDRA PANTH.



The suit was one for partition of property in the possession of the sons and grandsons of Nana Narain Rao. After the institution of the suit the plaintiff, Ram Chandra Rao, died and his widow, Janki Bai, was brought upon the record as his representative. The property in suit, or the bulk of it, had at one time belonged to Ram Chandra Panth, who, by a will dated the 24th of January 1852, devised it to Nana Narain Rao, to the exclusion of Narain Rao's two brothers. This will was the subject of litigation which was ultimately decided by the Privy Council in favour of Nana Narain Rao in 1862 (*Cf.* 9 Moo. I. A., 96). The property thus acquired by Nana Narain Rao, was dealt with by him by an instrument of the nature of a will executed on the 22nd of December 1864 By this document Nana Narain Rao attempted to arrange for devolution of his property after his death. He divided it, roughly, into three shares, one share for each of his sons. Provision was also made in the document for other matters of family interest, as more fully set forth in the judgment of the Court, and there was this further provision that "although the property has, with a view to avoid mutual disagreement, been mentioned below for partition, still this partition is not a bar to their (the sons) living together." The executant of this document lived until 1880, managing the property dealt with thereby as the head of the family, and adding to it. In 1880, Nana Narain Rao died. His sons, however, lived on together as before for some eighteen years. To all outward appearances they

(1) (1866) 11 Moo., I. A., 75 (2) (1903) L. R., 30 I. A., 139.

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behaved as a joint Hindu family. The property which had been dealt with by the will of Nana Narain Rao, above referred to, and the after acquired property was treated by the sons as the property of a joint family, that is to say the income was collected in one place and the family expenditure was met from that income and fresh property was also acquired therewith, without any regard to the question whether the income belonged to one member of the family rather than another. Accounts were never adjusted as between the individual members of the family and the members of the family remained admittedly "joint in food, residence, worship and all the money dealing and zamindari business." This state of things continued from the death of Nana Narain Rao, in 1880 until 1898, when dissensions began to arise, and in 1901 the present suit was brought by Ram Chandra Rao, for partition of his share. Not long after the institution of the suit the original plaintiff died, and his widow Janki Bai was brought on to the record as his representative. The suit was then decreed upon the finding that the bringing on of the widow was tantamount to a decision that the family was separate, but this decree was set aside by the High Court (*Cf.* I. L. R., 28 All., 109), and the case sent back to be tried on the merits. At the second trial practically no evidence was produced, but the defendants relied upon certain admissions made on behalf of the plaintiff as showing that the family was joint in food, worship and estate. The suit was, however, decided largely upon the pleadings of the defendants, which were held to amount to admissions that the family was not joint and on a construction of the will of Nana Narain Rao, and a decree was passed in favour of the widow of Ram Chandra Rao. The defendants appealed to the High Court.

Sir *W. M. Colvin*, Messrs. *W. K. Porter* and *B. E. O'Conor*, and Maulvi *Ghulam Mujtaba*, for the appellants.

The Hon'ble Pandit *Sundar Lal*, Pandit *Motı Lal Nehru*, Pandit *Mohan Lal Nehru*, Babu *Durga Charan Banerji*, and Munshi *Kanhaiya Lal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit for partition of family property brought by one Ram Chandar Rao, who died during its pendency, and is now represented

on the record by his widow Musammat Janki Bai. The Court below granted decree in favour of the plaintiff, and against this decree this appeal has been preferred. Ram Chandar Rao was one of the three sons of Nana Narain Rao, deceased, the other sons being Vasudeo Rao and Parsotam Rao. Nana Narain Rao had also two daughters, namely, Sarda Bai, and Rohni Bai. The defendants to the suit are Parsotam Rao, Madho Rao (son of Vasudeo Rao), and Waman Rao, son of Parsotam Rao. Madho Rao has since died. Nana Narain Rao acquired the estate of his father, Ram Chandra Panth, under the will of the latter, dated the 24th of January 1852. This will was disputed by his younger brothers on the ground that a Hindu had no power to make a disposition in the nature of a will of his self-acquired property, and on the further ground that, assuming the existence of such a power, the alleged will was not the will of Ram Chandra Panth. The zillah Court of Cawnpore decided in favour of the will. Upon appeal the Sadr Adalat of the North-Western Provinces reversed that decision, but on appeal to their Lordships of the Privy Council the will was upheld and the decree of the zillah Court restored. (The case is reported in 9 Moore's Indian Appeals, 96.) Nana Narain Rao having thus become owner of the property of his father executed an instrument in the nature of a will on the 22nd of December 1864. This document is described in the instrument itself as "an instrument relating to the partition of his estate (*matruka khas*) among the heirs of Nana Narain Rao, the eldest son and executor of Ram Chandra Panth, as drawn up by him, dated 22nd December 1864." It recites three deeds of gift, in favour of his wife, and sons Vasudeo and Parsotam Rao, respectively, and that a third son Ram Chandar, had been born and that consequently the deeds of gift should not be acted on. It then recites that three fresh detailed lists, giving the name of each heir, had been prepared, and that one of these lists was given to each heir, and one general list was sent to the Court to remove future disputes, so that each heir should act "according thereto, and not in contravention thereof." The document then provided that the heirs should all, according to their family custom, "live together with clean breast and maintain the good name of their ancestors," and contains this important

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provision that although the property had, with a view to mutual disagreement, been partitioned, still the partition was not to be a bar to the members of the family living together It then provides for the custody of jewelry, gold and silver ornaments set apart for the worship of Thakurji, and also for the expenses of the testator's obsequies and the investiture and marriage ceremonies of his son, Ram Chandar Rao, and his daughter Rohni Bai, in case these ceremonies should not be celebrated during his lifetime. In the seventh paragraph it is recited that mauza Lalpur, in the district of Cawnpore, stands in the name of Vasudeo Rao, and mauza Balwapur, in the same district, in that of Parsotam Rao; and that there is no village standing in the name of Ram Chandar Rao, and accordingly a provision is made that mauza Binaur should be given to Ram Chandar Rao. In paragraph 8 is a direction that "his three sons should divide and take in equal shares the zamindari shares" in the following villages, namely, a 2 anna share in mauza Baroha, a 2½ anna share in mauza Shahpur and a 2½ anna share in mauza Bhikhar. In paragraph 9 it is provided that his three sons should occupy the houses and shops, etc, in Lashkar and the kothi at Cawnpore, under the control of their mother, and should not partition them. Further directions are given, which it is unnecessary here particularly to refer to. Schedules appended to the instrument give the specification of the property and shares of property allotted to each son. A copy of the instrument enclosed in a sealed cover was handed to the Collector and by him directed to be kept in the office with due care until registration and was deposited in the record-room. This instrument forms the basis of the plaintiff's claim. To uphold the dignity of the family the members of it continued to live after the manner of a joint family, in fact they adopted the suggestion in the instrument executed by their father that the separation in interest effected by it should not be "a bar to their living together." When the plaintiff Ram Chandar Rao instituted the suit for partition, out of which this appeal has arisen, he was evidently at a loss to determine what the legal effect of the instrument of 1864, taken in conjunction with the mode of living of the family since the death of his father had upon the status of the family. It was not of much moment to him whether or not

that document worked a separation in interest of the family property. If it did so, he would be entitled to his share under it. If, on the other hand, it had not that effect, he would be entitled to a one-third share of the estate. Accordingly we find in the plaint an alternative claim put forward. In it the document of the 22nd of December 1864 is set forth in considerable detail, and in paragraph 10 it is stated that although the shares of all the three sons had been fixed by it and they considered themselves to be owners of a one-third share each, yet in compliance with the instructions of their father they all with their children lived together and the income from the whole property, irrespective of the fact that the properties were recorded in the names of individual members, was disbursed for the purposes of the family generally. Then follow these words:—"They (that is the members of the family) were not joint in residence and expenditure in the same way as members of a joint Hindu family are, but in order to maintain mutual good-will and union, each brother had a fixed share in the property and considered himself owner of a specified share therein." The allegations contained in paragraph 12 of the claim are in conflict with those in paragraph 10, for in the former of these paragraphs it is alleged that although the name of Vasudeo Rao was recorded in respect of mauza Lalpur, and after his death the name of his son, Madho Rao, was entered and the name of the defendant, Parsotam Rao, was entered in respect of mauza Balwapur, and some property had been purchased at auction solely in the name of the plaintiff, yet just as the names of all the three brothers were entered in mauza Binaur, though it had been allotted to the plaintiff alone, it was understood in respect of the whole property that when the actual division took place each brother would have a third share in each property. This is inconsistent with the earlier passage in the plaint to which we have referred. The plaintiff in his prayer to the plaint claimed partition of all the property, movable and immovable, on the basis of the family being joint, and also in the alternative he claimed to be entitled to his share as specified in the document of the 22nd of December 1864.

We now turn to the defence. In the first paragraph of the written statement under the heading "further pleas of the

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defendants" they set out the will of Ram Chandra Rao Pant in favour of Nana Narain Rao and say that Nana Narain Rao had full power to devise the portion of the estate of Ram Chandar Rao which devolved upon him under the will, and that he exercised this power in the instrument of the 22nd of December 1864. The paragraph ends as follows:—"He (*i.e.*, Nana Narain Rao) had therefore full power to devise it and he exercised this power in this way that he executed a will, dated the 22nd December 1864, and kept it in deposit as an instrument in the Collectorate and the Civil Court at Cawnpore, and under it, after the death of Nana Narain Rao Sahib, his three sons took possession, as specified below, of the property and interests bequeathed to them as executors, and not as heirs" The word "executors," we presume, is intended for "devisees" in contradistinction to heirs. Then in the next paragraph the provisions of the will are stated whereby his wife Saubhagwati Lachhmi Bai Sahiba was appointed executrix and provision was made for her during her life and after her death for the division amongst the three sons and two daughters of Nana Narain Rao of what should be left. Reference is then made to purchases made by Nana Narain Rao after the execution of the will and to gifts of ornaments made by him on the occasion of marriages in the family or amongst the dependents. In the fourth paragraph is a statement that after the death of Nana Narain Rao the property undisposed of devolved on his three sons and two daughters in accordance with the terms of the will. In the sixth paragraph the defendants say that the will was acted on and in the earlier portion is the following passage:—"After the death of the said Nana Narain Rao Sahib all the three of his sons took proprietary possession of the property as mentioned in the lists entered in the will and which remained after the additions and alterations and transfers and appropriations made by him. But according to the instructions of the said testator which were binding on them, and in order to maintain the dignity of the family, all the three brothers, like members of a joint family, remained joint in residence, food and expense. But the management of their respective properties continued to be in the hands of Vasudeo Rao Anna Sahib, who was the senior member of the family, and during his lifetime he acted in

consultation with all the members." In the seventh paragraph reference is made to differences amongst the members of the family and to the division of jewelry and ornaments made in consequence of these differences. This paragraph contains a statement that Vasudeo Rao, Parsotam Rao, and the plaintiff filed a suit in respect of a promissory note for Rs. 20,000 to which Musammat Sarda Bai had made claim, and that in consequence of this the parties determined to divide all the ornaments and jewelry, but that during the pendency of the suit Vasudeo Rao died. It then recites a settlement, dated the 7th of June 1887, whereby Musammat Sarda Bai received a note for Rs. 20,000 and relinquished her rights under the will, and also a settlement with Musammat Rohni Bai, dated the 6th of February 1887, whereby in consideration of a sum of Rs. 6,000 she also relinquished her rights under the will. Then follows this passage:—"In order to avoid the disturbance of the mutual union which existed on a firm footing in consequence of natural love and the directions of their father, they with mutual pleasure and in confidence held a meeting at their own dwelling house and the plaintiffs and the defendants Nos. 1 and 2 sitting together, and having regard to the dignity of the family and to the fact that there was no equal to them in respect at Bithur, and that the circumstances of the family should not be disclosed to anyone, fully considered over the matter, and, with a view to avoid dispute in future, divided among themselves all the gold and silver ornaments and jewels intended for males and females which were left by the said testator (that is Nana Narain Rao) at the time of his death, and thus enforced the aforesaid will without reducing anything to writing and took those things into their actual possession and retained the same." Later on, in paragraph 14, the defendants say that the plaintiff is merely entitled to a declaratory decree in respect of the property mentioned as his in list No. 1 annexed to the written statement and to a decree for delivery of possession after partition to the extent of one-third of the property in dispute, as mentioned in lists Nos. 2 and 3, and to a declaratory decree in respect of his right of residence in the dwelling houses, etc.

Now nothing can be clearer than this that in their defence the defendants set up and relied upon the instrument of the 22nd of

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December 1864 as a binding document. It is to be noticed that the family jewelry and ornaments were divided in accordance with it and that to this extent at least the terms of it were enforced. It is also manifest that the defendants did not regard the conduct of the members of the family in regard to the family property after the death of Nana Narain Rao as being inconsistent with the provisions of that instrument or as in any way affecting its full operation. The allegations of the plaintiff and of the defendants as to the status of the family are as nearly as may be identical.

Ram Chandar Rao filed a replication and in reply to paragraph 6 of the written statement, in which it is alleged that the three brothers remained joint in residence, food and expenses like members of a joint family, emphasized the position which he took up by a statement that the family was not a joint Hindu family, and averred that the true facts were set forth in paragraphs 8, 10, and 11 of the plaint. From this replication it is clear that it was not the case of the plaintiff Ram Chandar Rao that the family was a joint Hindu family.

Before the settlement of issues Ram Chandar Rao died, namely, on the 28th of December 1901, and on the 29th of April 1902 his widow was brought upon the record in his place. Upon his death there was a complete *volte face* on the part of the defendants. In view of his death it was in the interests of the defendants that the family should be regarded as a joint family, as in that case his widow would not be entitled to a life estate in his share, but merely to maintenance, and hence we find that, notwithstanding the positive assertion made by them in their written statement that the will of Nana Narain Rao was binding upon them, they shifted their ground and set up the case that Nana Narain Rao had no power to make a partition of his property and further that if the instrument which was executed by him did have the effect of causing a separation in interest amongst his sons, the evidence established a complete reunion of the family.

The plaintiff Musammat Janki Bai abandoned the claim to relief on the basis that the family was a joint family and claimed relief solely on the basis of the will, accepting the accuracy of the

lists of property appended to the written statement of the defendants. She also withdrew her claim in respect of the ornaments and jewelry which had been divided among the two surviving brothers and their nephew after the death of Vasudeo. She accepted in fact the defendants' case in regard to the jewelry which had already been divided. The Court below held in favour of the plaintiff and gave her a decree for separate possession of all the property mentioned in the defendants' list No. 1 and one-third after partition of the properties mentioned in the defendants' lists Nos. 2 and 3 and also of the houses in dispute. The learned Subordinate Judge appointed the Court Amin a commissioner for the partition of the properties not paying revenue to Government. To this appointment we shall have a word to say presently.

Two main grounds of appeal have been relied upon by Mr. *Porter* in his argument on behalf of the appellants. The first is that the property which devolved on Nana Narain Rao under the will of his father was not his separate property but became joint family property in the hands of himself and his sons, and that therefore Nana Narain Rao had no power to partition it as he purported to do by the document of 1864. This argument was largely based upon the authority of the case *Tara Chand* v. *Reeb Ram* (1) in which it was laid down that property which devolves upon a Hindu father under a will is ancestral property and that his children cannot be deprived of the right given to them therein at the moment of their birth according to the doctrines of the *Mitakshara*. He also relied upon *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (2). We are not disposed, in view of the pleadings of the parties and the clear admission in the written statement of the defendants of the right of Nana Narain Rao to dispose of his property amongst his sons, to permit this defence to be now set up. But, assuming that it is open to the defendants to do so, we are not prepared to follow the rulings on which the learned counsel for the defendants appellants relies. We prefer to follow the rule which is laid down in the case of *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (3) in which this subject was discussed and dealt with at considerable

(1) (1866) 3 Mad., H. C. Rep., 50. (2) (1863) 6 W. R., C. R., 71.
(3) (1886) I. L. Rep., 10 Bom., 528.

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length. In that case it was held that a son to whom his father leaves his self-acquired property by will takes the property under the will and not by inheritance, and that as property received by will is held by Hindu law to be received by gift, such property is self-acquired in the hands of the son and is not subject to partition in his lifetime at the suit of his son. As to any property which was subsequently acquired out of the common fund by the three brothers, the rules laid down in section 45 of the Transfer of Property Act would apply, and they would accordingly be entitled to hold it in shares in proportion to their interest in the common fund.

Then Mr. *Porter* maintained that the document of 1864 was never acted on, and that the members of the family continued as a joint Hindu family. Again he is met by the admissions made by his clients in their written statement, and in view of these admissions, it is hardly open to him to press his contention. But let us see on what that contention is based. Before the hearing the vakil for the defendant Parsotam Rao intimated in an application of the 26th of January 1906 (No. 309 of the record) the intention of his client to produce evidence to prove a number of matters manifesting the mode of living and of dealing with the family property adopted by the members of the family after the death of Nana Narain Rao. The principal of these matters were that all the members of the family were joint in food, residence and worship and in their money dealings and zamindari business; that the arrangements of the whole ilaka and the household business were joint; that the expenses of all the members on account of food, ceremonies and other necessaries were joint, namely, they used to be defrayed from the same fund, and all the income of all kinds of property used to remain joint although that property might be in the name of any member; that after the death of Nana Narain Rao a good deal of property was purchased and that some of this property was not purchased in the name of all the members, but in the name of particular members; but that still all the members used to enjoy the profits, which used to be included in the joint income of the ilaka. The plaintiff's vakil on behalf of his client admitted all these matters and an order was passed that in view of this admission it was not

necessary for the defendants to produce evidence in proof of their allegations. Mr. *Porter* relies upon the facts so admitted as establishing the case of his clients that the family was joint family; and he further contends that, even if the will of 1864 had the effect of working a separation in title, the conduct of the parties thereafter amounted to and proved a reunion in estate of the family.

We are unable to accede this contention. The matters which are set forth in the proceeding of the 26th of January 1906, prove no more in our opinion than that which is stated in paragraphs 9, 10 and 11 of the plaint and only show that the members of the family after the death of Nana Narain Rao, lived after the manner of a joint Hindu family. This is in accordance with the views of both parties as appears from their pleadings. The defendants did not, in their written defence, allege that the family was joint; in it is to be found no suggestion of any reunion. The position in fact taken up by both parties was identical. But in addition to this there had never been a joint title to the testator's property in the hands of his sons. Nana Narain Rao held it as self-acquired property, he made three separate devises to his sons, who took separately as self-acquired property the interest so devised to them. That being so, a question of reunion does not arise. That cannot be reunited which had never been joint. The word reunion implies that the property had at one time been joint in the hands of a family which afterwards separated and later on agreed to reunite and to hold their property jointly. Here there was never any union of interest in the property devised by the testator. Moreover, if there was evidence of a reunion we think that a tenancy in common and not a joint tenancy with benefit of survivorship would have been the result.

In *Appovier's* case (1) it is laid down that "when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share which he may

(1) (1866) 11 Moo. I. A. 75

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claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided," and later on their Lordships say:—" It is necessary to bear in mind the two-fold application of the word 'division.' There may be a division of right, and there may be a division of property, and thus after the execution of this instrument there was division of right in the whole property although in some portions that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed until some future time when it would be convenient to make that partition," * * *" and if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property, that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject matter. This may at any time be claimed by virtue of the separate right."

In the case before us the instrument of 1864 provided that the property of Nana Narain Rao should be the subject of ownership in certain defined shares and from the date when that instrument came into operation the family became a divided family with reference to the property, the subject of the will. This was in fact a separation in interest and in right.

This leads us to the consideration whether the subsequent conduct of the family in regard to their mode of life and dealings with the property, controlled or altered their status. Upon this question the ruling of their Lordships of the Privy Council in the case of *Balkishen Das* v *Ram Narain Sahu* (1) has a close bearing. In that case four members of a joint Hindu family, grandsons of one Lalji, entered into an agreement (*ikrarnama*) by which certain properties were given exclusively to two of the members, and with regard to the remainder, it was recited that a 4 anna share had been allotted to one of these members, and that, out of the remaining 12 anna share, specified shares had been allotted to the other three. It was provided that either joint or separate registration in the Collectorate of their respective names

(1) (1903) L. R., 30 I. A., 139.

might be effected, and it contained the following passage:—"Every one of us has by virtue of this deed the power either to continue to live together as a member of the joint family as before or to separate his own business, none of us having any objection thereto. There were concurrent findings of fact in the lower courts that in pursuance of the option reserved to them by the deed in question, the three descendants of Lalji remained joint. The first Court said that from the evidence of the plaintiff's witnesses it appeared that these three persons "formed members of a joint undivided family and that Ramjiban and Thakur died when living in commensality with Ram Narain, the plaintiff. All the three brothers were jointly in possession of the properties. Ramjiban was the head and manager of the family until his death and after him the plaintiff is in possession." The High Court confirmed this finding. On appeal their Lordships of the Privy Council reversed the decision of both Courts, holding that the ikrarnama effected a separation in estate between the members of the family and its legal construction and effect could not be controlled or altered by the subsequent conduct of the parties. Lord Davey, who delivered the judgment of their Lordships, in the course of his judgment referred to the fact that "Mahabir Parshad appears to have taken his share and that no more is heard of him, and that Ramjiban, Ram Narain and Thakur Parshad and after the latter's death Ramjiban and Ram Narain appear to have continued to live together and to have collected their revenue and enjoyed their property in all external respects in the same manner as before the execution of the ikrarnama." Referring to the ikrarnama he remarked:—"There is no difficulty in the construction of the ikrarnama, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners," and then referring to the passage in it which gave liberty to any of the parties either to live together as member of a joint family as before, observed that this clause "conferred on the parties no larger liberty of choice than they would have had without it. They might elect either to have a partition of their shares by metes and bounds or to continue to live together and enjoy their property in common as before. Whether they did one or the other would affect the mode of enjoyment but not the

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tenure of the property or their interest in it. Consistently with the broad principle laid down in *Appovier's* case, this was determined by the allotment to them of defined shares which, to use Lord Westbury's illustration, converted them from joint holders into tenants in common. He further expressed disapproval of the view that the legal construction of an unambiguous document like the ikrarnama could be controlled or altered by evidence of the subsequent conduct of the parties. He observed that "their Lordships did not regard the subsequent actions of the parties as inconsistent with an intention to subject the whole property to a division of interest, although it was not immediately to be perfected by an actual partition."

There is a close resemblance between the facts of this case and those of the case before us and in view of this decision we find it impossible to yield to the contention of the appellants. We have in the will of Nana Narain Rao in clear and unambiguous terms a disposition of his property amongst the members of his family. We have in the pleadings of the parties a recognition of the validity of this instrument—a recognition elicited at a time when their views had not been warped by any selfish considerations. We have the fact that in accordance with its provisions the jewelry and ornaments were divided and the claims of the daughters of Nana Narain Rao settled by agreement. In view of these matters we are wholly unable to hold that the family remained joint in title and interest. There is no evidence which would justify us in holding that the members of the family ever became reunited in interest.

We think therefore that the view of the Court below is correct, and dismiss the appeal with costs.

We notice that the Subordinate Judge has appointed the Amin of the Court as a commissioner to effect partition. By a recent ruling of this Court it has been held that under the provisions of the Code of Civil Procedure, at least in the absence of the agreement to the contrary, the Court is bound to appoint at least two commissioners. We therefore set aside his order whereby one commissioner only is appointed, and direct him to comply with the requirements of the Code.

Appeal dismissed.

Before Mr. Justice Richards.

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March 7.

PIRBHU NARAIN SINGH (DECREE-HOLDER) *v.* AMIR SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Act No IV of 1882 (*Transfer of Property Act*), *section* 90—*Decree for sale on a mortgage—Property ordered to be sold in part not susceptible of sale—Abandonment of claim to sell such part*

Held that on the true construction of the provisions of the Transfer of Property Act, 1882, a mortgagee is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under section 90 for any balance due after crediting the amount realized by the sale of the property actually sold *Muhammad Akbar* v *Munshi Ram* (1) distinguished. *Sheo Prasad* v. *Behari Lal* (2) *Kedar Nath* v *Chandu Mal* (3), and *Ghafur Hasan Khan* v. *Muhammad Rifayat-ullah Khan* (4) referred to.

THE decree-holder in this case held a decree for sale on a mortgage directing the sale of eleven plots of land. Out of these four plots were sold, and the decree was in part satisfied. The Collector, to whom the decree had been sent for execution, at this stage discovered that of the remaining plots some were occupancy holdings, though mentioned in the decree as fixed rate holdings, and others did not belong to the judgment-debtors. Consequently these plots were withdrawn from sale. Under these circumstances the decree-holder applied under section 90 of the Transfer of Property Act for a decree that the balance of the debt might be recovered from the defendants otherwise than out of the property mortgaged. The Court of first instance (Munsif of Benares) dismissed this application upon the ground that the whole of the property directed to be sold had not been sold in execution of the applicant's decree. On appeal this decree was upheld by the District Judge. The decree-holder then appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

Dr. *Tej Bahadur Sapru* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

RICHARDS, J.—This appeal arises out of an application made under section 90 of the Transfer of Property Act. A decree was

* Second Appeal No 1088 of 1905, from a decree of G A. Paterson, Esq., District Judge of Benares, dated the 26th of May 1905 confirming a decree of Babu Hira Lal Singh, Munsif of Benares, dated the 1st of April 1905.

(1) Weekly Notes, 1899, p 208.
(2) (1902) I. L. R., 25 All., 79.
(3) (1903) I. L R., 26 All, 25.
(4) (1905) I. L. R., 28 All., 19.

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obtained under section 88 of that Act directing sale of eleven plots of land. This decree was subsequently made absolute. The decree then went to the Collector for sale of the property. Four out of the eleven plots were sold, and the decree was thereby in part satisfied. The Collector then found that some of the remaining plots, although mentioned in the decree as fixed rate holdings, were in fact occupancy holdings, and that with regard to the other plots the judgment-debtors had no interest therein. Consequently no further sales were held under the mortgage decree. The decree-holder then applied under section 90 of the Transfer of Property Act for a decree that the balance of the debt might be recovered from the defendants otherwise than out of the mortgaged property. This application was met by objections that part of the mortgaged property was left unsold, the objections of course referring to the plots which I have just now referred to as having been found by the Collector to be unsaleable. The decree-holder answered the objections of the judgment-debtors by alleging that all the property which was capable of being sold had been sold (see paragraph 1 of the decree-holder's petition dated 11th February 1905 and filed on the 1st of April 1905). It has not been contended here that any of the property not sold was capable of being sold. But the respondents contend that whether it was saleable or not, the Court executing the decree was bound to put it up for sale, and that until that had been done, the decree-holder was not entitled to obtain an order under section 90. There is no doubt that a very strict interpretation was at one time given to section 90. In one case *Muhammad Akbar* v. *Munshi Ram* (1) a Bench of this Court held that where a mortgagee had obtained a decree for the sale of the mortgaged property and where a prior mortgagee had also obtained a decree for sale of the same property, and in execution of the latter decree the property was sold, the second mortgagee was not entitled to apply under section 90 even though the nett proceeds of the sale of the property were insufficient to satisfy the first mortgage. This case is distinguishable from the present case. There had been no sale at all in execution of the decree obtained by the second mortgagee. If, however, the principle laid down there is

(1) Weekly Notes, 1899, p. 208.

applicable to the present case, I do not feel bound to follow the decision, because I consider that there are authorities of at least equal authority, in which a contrary view has been taken. The decree-holder in this case clearly showed by the answer he put in to the judgment-debtors' objections that he abandoned all claim against the mortgaged property other than that part of it which had been actually sold, and Mr. *Gokul Prasad* has set at rest any question upon this point by expressly abandoning in open Court on behalf of his client any claim against the mortgaged plots which have not been sold. In the case of *Sheo Prasad* v. *Behari Lal* (1) it was held that a decree under section 90 might be had, although the mortgagee had not included in his suit or caused to be sold the entire of the mortgaged property. It is said in the judgment, at page 82:—"It seems to us that great hardship might be entailed on a mortgagee if he could not relinquish his claim to a part of the property purporting to be comprised in his mortgage except on the penalty of losing his right under section 90, if he found that it was to his advantage to do so. For example, it might be that a portion of the property was heavily incumbered. It might also be that the mortgagor's title to a portion of the property was in dispute. In either of these cases the result of endeavouring to sell property so incumbered or the portion the title to which was in dispute might entail heavy expenses and protracted litigation." These remarks appear to me to apply with equal force to the present case. When the decree-holder found that a portion of the property was of a nature that could not be legally sold, I can see no reason why he should not abandon his claim against it, nor do I see any good reason or common sense in forcing the Collector to go through the farce of putting up to sale property which he and the decree-holder believed could not be legally sold. In the case of *Ghufur Hasan Khan* v. *Muhammad Kifayat-ullah Khan* (2) it was held, following the case I have just referred to, that where a mortgagee obtained a decree for the sale of the entire mortgaged property, but on asking for an order absolute relinquished his claim against a part of the mortgaged property, he was entitled, when the proceeds of the property sold proved insufficient to

(1) (1902) I. L. R., 25 All., 79. (2) (1905) I. L. R., 28 All., 19.

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satisfy the decree, to obtain a decree under section 90 In the case of *Kedar Nath* v. *Chandu Mal* (1) it was held that where a decree and an order absolute for the sale of the entire of the mortgaged property had been passed, but before sale a third person succeeded in establishing his title to half of the mortgaged property, the decree-holder was entitled to an order under section 90, although there had been no sale or attempt at sale of that part of the property to which the mortgagor's title had proved defective There can be no doubt that if a mortgagee chooses to abandon all claim against the mortgaged property, he is entitled, independently altogether of section 90 of the Transfer of Property Act, to a personal decree It seems only reasonable that, on bringing a mortgage suit, the plaintiff, before or after a decree for sale, should be allowed to abandon his claim against a portion of the mortgaged property if he chooses to do so. The cases which I have cited seem to me to establish that on the true construction of the provisions of the Transfer of Property Act a mortgagee is entitled at any stage to abandon his claim against any portion of the mortgaged property and then obtain a decree under section 90 for any balance due after crediting the amount realized by sale of the property actually sold. I allow the appeal, set aside the orders of both the Courts below, and remand the execution case to the Court of first instance through the lower appellate Court with directions to readmit the same to the file of pending cases and proceed with it according to law. Costs will abide the result.

Appeal decreed and cause remanded.

(1) (1903) I. L. R., 26 All., 25.

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March 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox

BHOLA NATH (PLAINTIFF) *v.* GHASI RAM AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Minor—Right of minor member of a joint family to sue for partition.

Held that a minor member of a joint Hindu family may institute a suit for and obtain partition of his share in the joint family property if there exist circumstances such as in the interest of the minor render it advisable that his share should be set aside and secured for him.

THE plaintiff in this case sued as a minor under the guardianship of one Niadar Mal for partition of his share in the property of a joint family consisting of himself, his father Ghasi Ram and his uncle Moti Ram. He alleged that his father had admitted to a share in the property in suit the plaintiff's cousin Makhan Lal, the son of a deceased uncle, Ram Prasad, who according to the plaintiff, had separated from the rest of the family long before the date of the suit and was not entitled to a share in the property. Makhan Lal alone defended the suit, pleading that he was still joint with the other members of the family, and that the plaintiff being a minor was not entitled to sue. The Court of first instance (Subordinate Judge of Aligarh) dismissed the suit, holding that the plaintiff was not under the particular circumstances of the case entitled to maintain it. The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandra Mukerji*), for the respondents.

STANLEY, C. J.—This appeal arises out of a suit for partition instituted by a minor son against his father. In the plaint the plaintiff by his guardian assigned his reason for instituting the suit in paragraphs 8 and 9. He alleges that the defendant Ghasi Ram, wrongfully, in collusion with his brother, caused the name of his nephew Makhan Lal to be recorded in respect of one-third of the property in the village called Surajpur Shahbazpur, although he had no title to or concern with that property. In the succeeding paragraphs he states that Ghasi Ram was the lambardar of the village which I have mentioned and that he wrongfully misappropriates the income of that village. If this allegation be true,

* First Appeal No. 141 of 1905 from a decree of Maulvi Muhammad Shafi, Subordinate Judge of Aligarh, dated the 8th of March 1905.

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it would seem certainly to be for the interests of the minor plaintiff that the property should be partitioned and the interest of the plaintiff be thereby safeguarded. The learned Subordinate Judge, however, has dismissed the suit on the ground that no case of malversation was established. In the course of his judgment he observes :—"Under the Hindu law the minor son could only sue for partition on the ground of malversation." Then he quotes the following passage from Mr. Mayne's work :—"A suit could not be brought by or on behalf of a minor to enforce partition, unless on the ground of malversation, or some other circumstances which make it for his interest that his share should be set aside and secured for him"— (Mayne, section 400); and then the learned Subordinate Judge observes :—"Here in my opinion there was no case of malversation." Whether the learned Subordinate Judge intended by this to convey that no case of malversation had been alleged in the plaint we are unable to say. He evidently was of opinion that unless malversation was alleged and proved, the suit on behalf of a minor son for partition could not be maintained. He has overlooked the other circumstances which according to the authorities will justify the institution of a partition suit by or on behalf of a minor. These are such circumstances as in the interest of the minor render it advisable that his share should be set aside and secured for him. In other words, the question for the Court to determine is whether or not it is shown to be for the benefit of the minor that a partition of the joint family property should be effected. As this question does not appear to have been properly considered and the suit was dismissed on the sole ground that there was no case of malversation, we must allow this appeal. We set aside the decree, and remand the case under the provisions of section 562 of the Code of Civil Procedure to the Court below, with directions that it be reinstated in the file of pending suits and be disposed of on the merits, the important consideration for the Court being whether or not it is for the interest of the minor plaintiff that the family property should be partitioned.

Costs here and hitherto will abide the event.

KNOX, J.—I agree, and only wish to add that if the matter were *res integra* I should feel bound to express a doubt as to

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whether the Hindu law on the subject has been rightly apprehended. So far as I know no text has yet been found which prohibits a demand for partition on the part of a minor, and it is upon this that the law at present proceeds. At the same time the idea of a minor in a Hindu joint family asserting a right to partition as against his father is something so strange that, but for the Courts having held as they have done, I should have ventured to question the decision.

Appeal decreed and case remanded.

REVISIONAL CRIMINAL.

1907
March 14.

Before Mr. Justice Banerji

EMPEROR v. SUMER CHAND.*

Act (Local) No I of 1891 *(N.-W. P. and Oudh Water Works Act), sections 34, 40 and 41— Construction of Statutes—Omission to give notice of re-occupation of house—Water rate paid during period of non-occupation*

Held that the provisions of section 41 of the North-Western Provinces and Oudh Water Works Act, 1891, would not apply to the case of a person who had in fact regularly paid the water rate due in respect of the house during the period of its non-occupation

SUMER CHAND was convicted by a Bench of Magistrates of an offence under section 41 (3) of the North-Western Provinces and Oudh Water Works Act, 1891, in that he had omitted to give notice to the Municipal Board of the re-occupation of a house belonging to him which had been vacant, and was fined two rupees. Sumer Chand admitted not having given notice, but pleaded that in fact the water rate had been paid for the whole time that the house was unoccupied. An appeal from this conviction to the District Magistrate was dismissed, and Sumer Chand then applied to the High Court in revision, urging that as he had in fact paid all that was due for water rate in respect of the house in question he ought not to have been convicted.

Mr. *C. Ross. Alston*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

* Criminal Revision No. 633 of 1906.

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BANERJI, J.—This is an application for the revision of an order of a Bench of Magistrates convicting the applicant under section 41, sub-section (3) of the Water Works Act, No. I of 1891, and sentencing him to a fine. The application has been made on the ground that the order is not warranted by law.

Section 41, sub-section (1) of the Act provides, among other things, that "when any house which has been vacant is reoccupied, the owner shall, within fifteen days give notice thereof in writing to the Municipal Board. And by sub-section (3) any person failing to give the notice is punishable with fine. The applicant has been convicted of having omitted to give notice of the reoccupation of his house as required by the section. It was alleged on his behalf that he had paid the rates for the period during which the house remained unoccupied, and it is contended that the section does not apply to such a person.

Having regard to the scope and object of Chapter VII of the Act, this contention is, in my opinion, well founded. Section 40 lays down the mode in which arrears of water rates are to be recovered. Section 41, sub-section (1), requires that notice should be given of the erection of a new house or the rebuilding or enlargement of a house or of the reoccupation of a vacant house, and sub-section (3) lays down the penalty for omission to give such notice. The object of the section is clearly to ensure payment of water rate and to provide against evasion of payment. Section 41 should, I think, be read with section 34, under which a house which has remained unoccupied for three consecutive months is exempt from liability to payment. It is in respect of such a house that section 41 requires that notice should be given of reoccupation so that the rate payable in respect of it may be realized. Where the rate has been paid and there has been no evasion of payment, the penalty imposed by the section cannot be held to have been incurred. The language of the section is no doubt somewhat wide, but in my judgment the section should be reasonably construed, and so construing it I am unable to hold that the conviction of the applicant is legal, if, as he alleges, he paid the rate and there was no evasion of payment. As the Court which convicted the applicant did not determine whether his allegation as to payment was true, I must send back the case to

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the Court of first instance with directions to find, after taking evidence, whether the rate for the period of the non-occupation of the house was paid by or on behalf of the applicant, and I order accordingly. When the finding has been certified to this Court the case will be put up for hearing.

Before, however, a return could be made to this remand the applicant died. The Court accordingly passed the following order:—

BANERJI, J.—Sumer Chand, the applicant in this case, died before a return could be made to the order of this Court dated the 21st of December 1906. The application for revision therefore abates. It will be so recorded.

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March 11.

Before Mr. Justice Richards.

EMPEROR v. DEBI *

Act No. XLV of 1860 (*Indian Penal Code*), *section* 223—*Criminal Procedure Code, section* 54—*Escape from lawful custody—Chaukidar.*

The police of an adjoining Native State arrested in British territory one Paran Singh suspected of having committed an offence in the Native State, and made him over to one Debi, a chaukidar, from whose custody he escaped. *Held* that neither the original arrest nor the subsequent custody by the chaukidar were lawful, and therefore that the chaukidar could not properly be convicted under section 223 of the Indian Penal Code *Empress of India* v. *Kallu* (1), *Kalua* v. *Kalu Chaukidar* (2) and *King-Emperor* v. *Johri* (3) referred to.

ONE Paran Singh, a subject of a Native State bordering on British territory, was "wanted" by the police of his own State. They came into British territory in search of him and having arrested him there made him over to the custody of one Debi, a chaukidar. From this custody Paran Singh managed to escape. The chaukidar was tried for an offence under section 223 of the Indian Penal Code, convicted by the Joint Magistrate of Hamirpur and sentenced to three months' rigorous imprisonment. The District Magistrate of Hamirpur, being of opinion that the custody from which Paran Singh escaped was not a legal custody, referred the case to the High Court under section 438 of the Code of Criminal Procedure recommending the acquittal of Debi.

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* Criminal Reference No. 82 of 1907.

(1) (1880) I. L. R., 3 All., 60. (2) (1900) I. L. R., 27 Calc., 386.
(3) (1901) I. L. R., 23 All., 266.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

RICHARDS, J.—The facts out of which this reference arises are as follows:—The native police of Alipur, a Native State, suspecting one Paran Singh of theft, searched his house in British India, arrested him in British India, and handed him over to the custody of one Debi, chaukidar of Gedo, a place situated in British India. Debi permitted Paran Singh to escape. He was thereupon charged under section 223 of the Indian Penal Code, that being a public servant he was bound as such public servant to keep Paran Singh in confinement, Paran Singh being a person charged with, or convicted of, an offence, or lawfully committed to custody. Now Paran Singh had neither been charged with, nor convicted of any offence. The question is—was he lawfully committed to custody? He had been arrested by the Native State Police in British territory, and it is quite clear that they had no right to arrest him there. The Magistrate in his explanation says that the chaukidar Debi was a police officer, and under section 54, cl. (7), he was entitled to arrest Paran Singh without a warrant. In the case of *Empress of India* v. *Kallu* (1) the contrary was held. In *Kalai* v. *Kalu Chowkidar* (2) the Court, following the case I have just mentioned, held that where a person had committed a theft and had been made over to the custody of a village chaukidar, the accused could not be convicted under section 225 of the Indian Penal Code, for rescuing the alleged thief from lawful custody. The Court held that the chaukidar was not "lawfully detaining" the alleged thief. The same view was taken by this Court in the case of *King-Emperor* v. *Johri* (3). I think the conviction ought to be set aside as suggested by the District Magistrate. I accordingly set aside the order of the Magistrate dated 20th December 1906, acquit Debi of the offence with which he was charged, and direct his immediate release. His bail bond will be vacated.

(1) (1880) I. L. R., 3 All., 50. (2) 1900) I. L. R., 27 Calc., 366.
(3) (1901) I. L. R., 23 All., 266.

APPELLATE CIVIL.

1907, *March* 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

THE MAHARAJA OF JAIPUR (DEFENDANT) v. LALJI SAHAI (PLAINTIFF) AND KISHORI AND OTHERS (DEFENDANTS) *

Civil Procedure Code, section 433—Suit against a ruling chief—Permission to sue granted in absence of necessary conditions precedent—Jurisdiction.

A suit for the recovery of arrears of salary was brought in the Court of the Subordinate Judge of Agra against the Maharaja of Jaipur. The plaintiff obtained the consent of the Governor General in Council to the institution of the suit, granted ostensibly in accordance with the provisions of section 433 of the Code of Civil Procedure, but in fact none of the conditions enumerated in clause (2) of the section existed. *Held* that the suit was not maintainable.

THIS was a suit brought by one Lalji Sahai against the Maharaja of Jaipur, and against the representatives of his late agent Captain Man Singh, to recover arrears of pay alleged to be due to him as his Highness' agent. The plaintiff in his plaint says that Captain Man Singh, who was the manager of the Maharaja, on the 13th of January 1895, appointed him agent at a salary of Rs. 130 per month to look after the legal work of the temple at Bindraban which belongs to the appellant. His Highness the Maharaja filed a defence to the suit, and amongst other pleas averred that the suit could not be brought against him according to law, and that the Government of India could not grant sanction under section 433 of the Code of Civil Procedure for the institution of a suit for money against his state. The defence of His Highness was struck out under section 136 of the Code on the ground that he had not complied with certain directions of the Court, and the suit was proceeded with *ex parte*, with the result that a decree was given against His Highness alone, the other defendants being exempted from liability to satisfy the plaintiff's claim. From this decree the Maharaja appealed, and, amongst other grounds, pleaded that "the sanction granted for the institution of the suit was illegal, inasmuch as the claim being for money due on account of salary not charged on immovable property, did not come within the category of suits for the institution of which sanction could be granted under section 433 of the Code of Civil Procedure"

* First Appeal No. 42 of 1905, from a decree of Babu Raj Nath Prasad, Subordinate Judge of Agra, dated the 11th of October 1904.

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THE MAHARAJA OF JAIPUR v. LALJI SAHAI

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandra Mukerji*), for the appellant.

The Hon'ble Pandit *Sundar Lal* and Lala *Kedar Nath*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The plaintiff in the suit out of which this appeal has arisen sued the appellant, the Maharaja of Jaipur, as also the representatives of his late agent Captain Man Singh, to recover arrears of pay alleged to be due to him as His Highness' agent. The plaintiff in his plaint says that Captain Man Singh, who was the manager of the Maharaja, on the 13th of January 1895 appointed him agent at a salary of Rs. 130 per month to look after the legal work of the temple at Bindraban which belongs to the appellant. His Highness the Maharaja filed a defence to the suit, and amongst other pleas averred that the suit could not be brought against him according to law, and that the Government of India could not grant sanction under section 433 of the Code of Civil Procedure for the institution of a suit for money against his state. The defence of His Highness was struck out under section 136 of the Code on the ground that he had not complied with certain directions of the Court, and the suit was proceeded with *ex parte*, with the result that a decree was given against His Highness alone, the other defendants being exempted from liability to satisfy the plaintiff's claim. From this decree the present appeal has been preferred, and amongst other grounds the following has been pressed before us, namely, that "the sanction granted for the institution of the suit was illegal, inasmuch as the claim being for money due on account of salary not charged on immovable property, did not come within the category of suits for the institution of which sanction could be granted under section 433 of the Code of Civil Procedure." It appears that sanction was granted on the 24th of December 1903 in these terms:—"This is to certify that under the provisions of section 433 of the Code of Civil Procedure, the Governor General in Council consents to a civil suit being instituted in the Court of the Subordinate Judge of Agra against His Highness the Maharaja of Jaipur by Lalji Sahai for the recovery of arrears of pay alleged to be due to him as His Highness' agent." This purports to be signed by the Secretary to the

Government of India in the Foreign Department. It will be observed from this certificate that the consent was for the institution of a suit for the recovery of arrears of pay and for no other purpose. Section 433 of the Code of Civil Procedure, under which this consent is expressed to have been given, provides for the institution of suits against Princes or Chiefs and other persons, and enables the Governor General in Council to consent to the institution of suits against such persons, providing that such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify in the case of any suit or class of suits the Court in which the Prince, Chief, Ambassador or Envoy may be sued. But there follows this important restriction, *viz*, "the consent shall not be given unless the Prince, Chief, Ambassador or Envoy *(a)* has instituted a suit in the Court against the person desiring to sue him, or *(b)* by himself or another trades within the local limits of the jurisdiction of the Court, or *(c)* is in possession of immovable property situate within those limits and is to be sued with reference to such possession or for money charged on that property." As to *(a)*, no suit such as is referred to in it has been instituted by the defendant appellant. As to *(b)*, there is no allegation in the plaint that the defendant appellant either himself or by another trades within the local limits of the jurisdiction of the Court, and as to *(c)*, although the defendant appellant is in possession of immovable property situate within the limits of the jurisdiction of the Subordinate Judge of Agra, the suit is not with reference to such possession, or for money charged on the property of which he is so in possession. He is simply sued in this case for arrears of pay said to be due to the plaintiff as his servant. Under these circumstances it is clear that the learned Subordinate Judge had no jurisdiction to entertain the suit, inasmuch as it was not one falling within the purview of section 433 and could not be maintained by virtue of the consent given by the Government of India. It is unnecessary for us to consider the other grounds of appeal. We, therefore, allow the appeal, set aside the decree of the Court below, and dismiss the suit as against the appellant with costs in both Courts.

Appeal decreed.

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March 22

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr Justice Banerji and Mr. Justice Sir William Burkitt.

HASIB-UL-NISSA (PLAINTIFF) *v.* GHAFUR-ULLAH KHAN (DEFENDANT) *

Act No VII of 1870 *(Court Fees Act), section* 7, v *(b) and (d) and section* 28—*Court fee—Document received through mistake or inadvertence*

The plaintiff in a suit for pre-emption stated in his plaint—"The suit is valued at Rs 197-8-0, five times of Rs 39-8-0, the amount of revenue of the property." The property claimed was described as "41 bighas 10 biswas 5 biswansis paying a revenue of Rs 39-8-0, entered as holding No 2 in the khewat, out of a 3 biswa 10 biswansi 18 kachwansi 9 nanwansi 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs 95, situate in thok Deputy Ali Raza Khan, in village Ukarna." The Munsarim of the Court in which the plaint was presented on the last day of limitation accepted this valuation and reported that the plaint was properly stamped.

Held that inasmuch as the plaintiff had not stated whether the revenue payable in respect of the share claimed had been separately assessed and recorded in the Collector's register as such, it became the duty of the Munsarim to inquire whether it was separately assessed. The plaint had been admitted through the mistake or inadvertence of the officer of the Court and the plaintiff was entitled to the benefit of section 28 of the Court Fees Act, 1870.

THIS was a suit for pre-emption of a sale of zamindari property which had taken place on the 18th of April 1904. The suit was instituted on the 18th of April 1905. In his plaint the plaintiff stated:—"The suit is valued at Rs. 197-8-0, five times of Rs. 39-8-0, the amount of revenue of the property," and the property was described as "41 bighas, 10 biswas, and 5 biswansis, paying a revenue of Rs. 39-8-0, entered as holding No. 2 in the khewat, out of a 3 biswa, 10 biswansi, 18 kachwansi, 9 nanwansi, 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs. 95, situate in thok Deputy Ali Raza Khan, in village Ukarna." The Munsarim reported that the Court and process fees were sufficient, but at the hearing an objection was taken that the Court fee was insufficient inasmuch as it should have been estimated under sub-division (*d*) and not under sub-division (*b*) of section 7, sub-section v, of the Court Fees Act,

* Second Appeal No. 303 of 1906, from a decree of Babu Khetter Mohan Ghose, second Additional Judge of Aligarh, dated the 30th of January 1906, reversing a decree of Babu Jagat Narain, Munsif of Koil, dated the 6th of September 1905.

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1870. The Court of first instance (Munsif of Koil) gave effect to this objection and directed the deficiency to be made good by the 19th of August 1905, and it was deposited within the time allowed. The Munsif gave the plaintiff a decree for pre-emption. The defendant vendee appealed, upon the ground *inter alia*, that the additional court fee had been paid in after the period of limitation for the suit had expired, and that the suit was therefore time-barred. The lower appellate Court gave effect to this contention, allowed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court.

Mr. *E. A. Howard*, for the appellant.

Maulvi *Abdul Majid*, Mr. *B. E. O'Conor* and the Hon'ble Pandit *Sundar Lal*, for the respondent.

STANLEY, C J., and BANERJI and BURKITT, JJ.—This appeal arises out of a suit for pre-emption which was instituted on the 18th of April 1905. The sale which is sought to be pre-empted took place on the 18th of April 1904, so that the plaintiff left it to the last day available to him for bringing the suit. The valuation for the purpose of court fee was estimated at five times the revenue, the plaintiff being under the impression that the case fell under sub-division (*b*) of sub-section v of section 7 of the Court Fees Act, Act No. VII of 1870. At the hearing an objection was taken as to the court fee and the Munsif determined this objection in favour of the objector, holding that there was a deficiency, as the court fees ought to have been estimated under sub-division (*d*) of the section to which we have referred and not under sub-division (*b*), namely, at the market value of the land. The deficiency was ordered to be made good by the 19th of August 1905, and this was done and the case disposed of on the merits. The Munsif gave the plaintiff a decree for pre-emption.

Upon appeal the lower appellate Court held that, inasmuch as the deficiency in the court fee was made good after the period allowed by the law of limitation had expired, the suit was barred by limitation, and reversing the decision of the Court below dismissed the plaintiff's claim. The present appeal was therefore preferred.

Mr. *Howard* on behalf of the appellant relies upon the provisions of section 28 of the Court Fees Act. That section provides

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that "if any document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the Presiding Judge . . . may, if he thinks fit, order that such document be stamped as he may direct, and on such document being stamped accordingly the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance." It is admitted that if the mistake in the matter of the court fee had been a mistake on the part of the officer of the Court, this section would apply. But it is contended on behalf of the respondents that the mistake in the matter of the court fee was a mistake of the plaintiff and not a mistake of any officer of the Court. The question therefore narrows itself down to this simple question, whether or not in this case the deficiency in the court fee was due to a mistake of the plaintiff or a mistake of the officer of the Court?

We find in the plaint the following statements made with a view to the determination of the proper court fee, namely :—"The suit is valued at Rs. 197-8-0, five times of Rs. 39-8-0, the amount of revenue of the property," and later on the property is described as "41 bighas 10 biswas and 5 biswansis, paying a revenue of Rs. 39-8-0, entered as holding No. 2 in the khewat out of a 3 biswa 10 biswansi 18 kachwansi 9 nanwansi 15 tanwansi share, comprising an area of 101 bighas, paying a revenue of Rs. 95, situate in thok, et cetera." The Munsarim reported that the court and process fees were sufficient. Now it appears to us that the fair inference from the language which we have quoted from the plaint is that the 41 bighas odd, the subject matter of the suit, formed only part of the share comprising an area of 101 bighas which was assessed to revenue. The plaintiff does not state that the 41 bighas were separately assessed to revenue or recorded in the Collector's register as such. He merely states, as we infer, that the fair proportion of the revenue payable by the larger area of 101 bighas would be Rs. 39-8-0, and calculating five times this amount he assessed the value of the suit in accordance with the provisions of sub-division (*b*) of the section. If the plaintiff had stated that the revenue payable in respect of the 41 bighas had been separately assessed and recorded in the Collector's register as such, then undoubtedly the Munsarim of the Court would have

been in no default in the matter; but the plaintiff did not state so, and therefore it was the duty of the Munsarim to inquire whether or not the smaller area was separately assessed for revenue. We think, therefore, that the mistake or inadvertence in this case was that of the officer of the Court, and such being the case that the plaintiff is entitled to the benefit of section 28 of the Act. We therefore allow the appeal, set aside the decree of the lower appellate Court, and, inasmuch as the appeal was decided upon a preliminary point and we have reversed the decision upon that point, we remand the appeal to the lower appellate Court with directions that it be re-entered in the file of pending appeals in its proper number and be decided on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1907
March 23.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Sir William Burkitt, Mr. Justice Aikman and Mr. Justice Richards.

RAM SHANKAR LAL (DEFENDANT) *v.* GANESH PRASAD AND ANOTHER (PLAINTIFFS) AND BALDEO DAS AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), *Chapter IV passim—Mortgage—Mortgage of mortgagee rights—Right of sub-mortgagee to bring to sale the mortgagee rights of his mortgagor—"Property."*

Held by the Full Bench STANLEY, C. J., and KNOX, BANERJI, BURKITT, AIKMAN, and RICHARDS, JJ., that a sub-mortgagee of mortgagee rights in immovable property is entitled to a decree for sale of the mortgagee rights of his mortgagor.

Per STANLEY, C.J.—In a properly constituted suit a puisne mortgagee or sub-mortgagee may have a sale of the interest mortgaged to them respectively, subject, in the case of a puisne mortgage, to the rights of a prior incumbrancer, and subject, in the case of a sub-mortgage, to the rights of redemption of the original mortgagor.

Mata Din Kasodhan v *Kazim Hussain* (1), considered and dissented from. *Ganga Prasad* v. *Chunni Lal* (2) discussed and distinguished *Raghunath Prasad* v. *Jurawan Rai* (3), *Subadh Rai* v *Raghunath Prasad* (4); *Jones* v *Skinner* (5), *Taylor* v *Russell* (6), *In re Sarawat* (7), *Rose* v *Page* (8) *Sladen* v *Rugg* (9),

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* First Appeal No 268 of 1904 from a decree of Babu Pramaths Nath Banerji, Subordinate Judge of Benares, dated the 5th of August 1904

(1) (1891) I. L. R., 13 All., 432
(2) (1895) I. L. R., 18 All., 118.
(3) (1886) I. L. R., 8 All., 105.
(4) (1885) I. L. R., 7 All., 568, at page 574
(5) (1835) 5 L. J., Ch., 90
(6) L. R., 1892 A. C., 256
(7) (1874) 17 Eq., 279
(8) (1829) 2 Simons, 471, 29 R. R., 142.
(9) (1843) 3 Hare, 35, 64 R. R., 204.

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RAM SHANKAR LAL v. GANESH PRASAD

In re Hodson and Howe's Contract (1), *Venatachella Kaudiun* v. *Panjanadien* (2), *Kanti Ram* v. *Kutub-ud-din Mahomed* (3), *Beni Madhub Mohapatra* v. *Sourendra Mohun Tagore* (4), *Debendra Narain Roy* v *Rumtaran Banerjee* (5), *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (6), *Muthu Vijia Raghunatha Ramachandra Vacha Mahals Thurar* v. *Venkatachallam Chetti* (7) and *Raj Coomary Dassee* v *Proo Madhub Nundy* (8) referred to

THIS was a suit for sale upon a mortgage executed by Gaya Prasad and Musammat Jasoda Kunwar in favour of the predecessor in title of the plaintiffs respondents. The mortgaged property comprised, in addition to certain immovable property, the mortgagee rights of the mortgagors in six mortgages held by them. Amongst the defences to the suit a plea was raised that a mortgage of mortgagee rights was invalid according to law, and that no decree could be passed for the sale of mortgagee rights. The Court of first instance decreed the plaintiffs' claim, and passed a decree for the sale, *inter alia*, of the mortgagees' rights mortgaged to the plaintiffs. The defendant Ram Shankar Lal appealed to the High Court and again raised the question whether a decree could legally be passed for the sale of mortgagee rights. The appeal came before a Bench consisting of Banerji and Aikman, JJ., on whose recommendation the following question was referred for decision to a Full Bench of the whole Court :—"Whether a sub-mortgagee of mortgagee rights in immovable property is entitled to a decree for sale of the mortgagee rights of his mortgagor in enforcement of his mortgage?"

Babu *Satya Chandra Mukerji* (with Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*), for the appellant, submitted that a sub-mortgagee was not entitled to get a decree for the sale of the mortgagee rights of his mortgagor and that his only remedy was to get a simple decree for money. The leading authority for this proposition was the case of *Ganga Prasad v. Chunni Lal* (9), which had been uniformly followed since its decision in 1895. In that case the sub-mortgagee asked for a sale of the mortgaged property itself, that is, the estate of the original mortgagors, and had got a decree in accordance with his prayer from the Subordinate Judge. It was open to this

(1) (1887) L R., 35 Ch D., 668.
(2) (1881) I. L. R., 4 Mad., 213
(3) (1894) I L. R., 22 Calc., 33
(4) (1895) I L R, 23 Calc., 795.
(5) (1903) I L R, 30 Calc, 609
(6) (1906) I. L R, 33 Calc, 425.
(7) (1886) I. L. R, 20 Mad, 35.
(8) (1897) 1 C W. N, 453.
(9) (1895) I. L. R., 18 All, 113.

Court to have granted him a decree for the sale of the mortgagee rights of his mortgagor if this Court had thought proper to do so. The dictum that the *sole* right of a sub-mortgagee was to get a decree for money was not *obiter*, but directly necessary for the decision arrived at. The position taken up in this case was the direct and necessary result of the definition of 'property' in chapter IV of the Transfer of Property Act, 1882, as explained in the case of *Mata Din Kasodhan* v. *Kazim Hussain* (1). The definition of 'property' given by Edge, C.J., was that it meant the actual physical object itself and not merely rights therein. This definition was not accepted by Mahmood, J., but had the concurrence of Straight, Tyrrell and Knox, JJ., and the decree in appeal in that case was one passed by Burkitt, J., when District Judge of Gorakhpur. Edge, C.J., had examined in his judgment all the sections in chapter IV of the Transfer of Property Act which bore on the subject, and he came to the conclusion that 'property' did not mean an interest merely in property, and that view had prevailed in this Court for over sixteen years. No doubt there might be a valid mortgage of mortgagee rights, but the question was what were the remedies of the sub-mortgagee? He might get, and could only get, a decree for money, but in execution of this decree he could bring to sale the mortgagee rights of his mortgagor just as he could bring to sale any other item of property belonging to his judgment-debtor. He could not, however, get a decree for sale under section 88 of the Transfer of Property Act. The reasons given for the decision of the Full Bench in Mata Din Kasodhan's case were exhaustive. Other cases in this Court which supported the contention that a sub-mortgagee could not get a decree for sale of mortgagee rights were *Misri Lal* v. *Abdul Aziz Khan* (2), *Ram Subhag Misr* v. *Nur Singh* (3), and *Ram Jatan Rai* v. *Ramkit Singh* (4). This view was also supported by *Padgaya bin Nagaya* v. *Baji Babaji Moholkar* (5). The Madras High Court in *Muthu Vijia Raghunatha* v. *Venkatachallam Chetti* (6) dissented from the view taken in *Ganga Prasad* v. *Chunni Lal*, but what was held

(1) (1891) I. L. R., 13 All., 432.
(2) (1901) I. L. R., 21 All., 53; (1902) I. L. R., 22 All., 216.
(3) (1905) I. L. R., 27 All., 472.
(4) (1905) I. L. R., 27 All., 511.
(5) (1895) I. L. R., 20 Bom., 549.
(6) (1896) I. L. R., 20 Mad., 35.

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there was that a sub-mortgagee could not get a decree for sale of the mortgaged property unless he made the original mortgagors parties to his suit. The Madras Court has not laid down that there could be a decree for sale of the mortgagee rights. This view was consistent with the law in England on the subject. The decree which a sub-mortgagee gets there is described in Fisher on Mortgages, 5th edition, para. 1495. The view taken in *Mata Din Kasodhan's* case has been held to be good law for a long period and should not lightly be departed from.

The Hon'ble Pandit *Sundar Lal* (with whom Mr. *Muhammad Ishaq Khan* and Babu *Durga Charan Banerji*), for the respondents :—

The question in this case is whether at the suit of a sub-mortgagee the mortgagee rights of his mortgagor can be sold. Looking at the question from the point of view of principle only it presents no difficulty. The difficulty, however, is created by the ruling of this Court in the case of *Mata Din Kasodhan* v. *Kazim Husain*. It has been decided in that case that 'property' in chapter IV of the Transfer of Property Act, 1882, means 'tangible property' as distinguished from mere rights in property, and that under a decree under section 8 of that Act it is only such 'tangible property' which can be sold. On the principle of the decision in that case it has been held that no decree can be made for the sale of mortgagee rights, although in the earlier case of *Raghunath Prasad* v. *Jurawan Rai* (1) it was held by a Full Bench of this Court that such a decree could be made. The question is which of these two Full Bench rulings lays down a correct rule of law?

Analyzing the reasoning of the decision in the case of Mata Din it seems to be based on five grounds—(1) on the construction of the words "specific immovable property" in section 58 of Act No. IV of 1882, (2) on inferences drawn from section 60, (3) on sections 86 to 93, (4) on sections 74 and 75, and (5) on the construction placed on section 85.

Dealing with each ground separately, it is submitted that the first of these fails to give effect to the definition of the term immovable property in section 3 of the General Clauses Act, by which that term is held to mean and include "land, benefits to

(1) (1886) I. L. R., 8 All., 105.

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arise out of land, and things attached to the earth or permanently fastened to the earth." In the absence of anything in the context to the contrary, this term must be held to have been used in the sense defined in this Act. If the term 'immovable property' was intended to be used in a narrower sense, some express rule of law indicating such intention would have found place in the Transfer of Property Act. The only limitation imposed on that term is to be found in section 3, by which the term 'immovable property' is said "not to include standing timber, growing crops or grass." Under section 6 of the Act "property of any kind may be transferred" and the Act contemplates not only transfers of the tangible property itself, but of rights in the said property which fall short of full proprietary rights. In the chapter on mortgages itself we find indications of it. Thus sections 65 (*d*) and (*e*), section 71 and section 72 (*e*) of the Act deal with cases of mortgages of lease-hold rights. According to Lord Langdale, "property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. *Jones* v. *Skinner* (1)." The use of the term 'specific' before the words 'immovable property' in section 58 means only this that the property mortgaged must be specified, and does not limit the ordinary connotation of the term 'immovable property.' The true interpretation of section 58 read with the General Clauses Act does not sustain the conclusion arrived at in *Mata Din's* case.

Section 60 of the Act directs that in a suit for redemption the Court may direct the mortgagee "to retransfer the mortgaged property" to the mortgagor. It has been said that this section contemplates the retransfer of the entire tangible property; but if the term 'mortgaged property,' on a true interpretation of section 58, includes interests of any kind which may be the subject of a mortgage, this conclusion obviously fails. Similar inferences drawn from the language of sections 86—93 of the Transfer of Property Act fail for the same reason. The provisions of the Transfer of Property Act deal generally with a case in which there is a single mortgage only, and there are no express provisions dealing with the cases where successive mortgages on the same

(1) (1836) 5 L. J., Ch., 30

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property are involved. The Courts apply to such cases the general principles of the law of mortgage laid down in the Act. The provisions in section 86, or 89 or 92 of the Act requiring transfer of the property to the mortgagor do not therefore sustain the inference drawn from them. Where there are successive mortgages on the same property, the mortgagor may redeem any one of them at his choice—*Tajjo Bibi* v. *Bhagwan Prasad* (1).

Section 93 enacts that if in such a case the mortgagor ultimately fails to redeem, the mortgagee may obtain an order for sale of the property. If the term 'property' in section 93 means tangible property only, a mortgagor may sue upon his puisne mortgage to redeem, and, on his failing to pay the amount of the mortgage money, the mortgagee may sell the whole property, though it is subject to a prior mortgage, and the proceeds of the sale will be applied to the satisfaction of the puisne mortgage, the balance being payable to the plaintiff. This would defeat the prior mortgage.

Sections 74 and 75 recognize the rights of a puisne mortgagee to redeem a prior mortgage and thus to step into the shoes of the prior mortgagee; but this is not exhaustive of the rights of the puisne mortgagee, as was held in *Mata Din's* case. This is one of his rights, and he may in addition exercise the right to sell or foreclose the property mortgaged to him.

The last section upon which a great deal of the judgment of the Full Bench turns is section 85. Under that section it is said that a prior mortgagee is a person "having an interest in the property comprised in a mortgage," and must be joined as a party to the suit, and it is said that it was perfectly unnecessary to make a prior mortgagee party to a suit of a puisne mortgage unless it be to redeem him, and therefore the redemption of a prior mortgage is a condition precedent to sale on a puisne mortgage. Under the law as it prevails in England and as it was understood in this country prior to the ruling in *Mata Din's* case, a prior mortgagee was not a necessary party to a suit on the subsequent mortgage unless it was sought to redeem him or to obtain any declaration in respect of his rights as a prior mortgagee:—Ghose on Mortgages, 3rd ed., 681, 684; Fisher on

(1) (1893) I. L. R., 16 All., 235.

mortgages, 5th ed., 659; Daniell's Chancery Practice, paragraph 186; Coote on Mortgages, Vol. 1, p. 741; Jones on Mortgages, p. 641; *Raghunath Prasad v. Jurawan Rai* (1).

Section 85 does not make any change in the law. In the suit of the second mortgagee the property comprised in the mortgage is the rights which his mortgagor mortgaged to the puisne mortgagee, and in such rights the original mortgagor is not a person having any interest. This is the view taken in the Calcutta and Madras High Courts—*Muthu Vijia* v. *Venkatachallam Chetti* (2), *Kanti Ram* v. *Kutub-ud-din Mahomed* (3), *Beni Madhub Mohapatra* v. *Sourendra Mohun Tagore* (4), *Debendra Narain Roy* v. *Ramtaran Banerjee* (5), *Raj Coomary Dassee* v. *Preo Madhub Nundy* (6), *Surji Ram* v. *Barhamdeo* (7), *Baij Nath* v. *Mahomed Ibrahim* (8), *Har Parshad* v. *Dal Mardan* (9) and *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (10).

Section 96 of the Transfer of Property Act contemplates the sale of property subject to a prior mortgage, and section 97 also deals with the same case. No sufficient reason is given to explain or waive the effect of these sections in *Mata Din's* case. The only Court in which the ruling in *Mata Din's* case is accepted in some of its features is the Bombay High Court, *cf Sorabji* v. *Ratonji* (11) and *Keshav Ram* v. *Ranchhod* (12).

The right of a sub-mortgagee to sell is recognised in *Muthu Vijia* v. *Venkatachallam* (2). See also the form of decree in the case of a sub-mortgage as given in Fisher on Mortgages, 919, paragraph 1945; Seton on Decrees, 5th ed., p. 1730; Ghose on Mortgages, p. 700; Robbins on Mortgages, p. 999, and Coote on Mortgages, p. 1018.

There is nothing in section 58 of the Transfer of Property Act to bar a mortgagee from mortgaging his rights as such mortgagee to a third party. The mortgagor himself mortgaged the property in the first mortgage made by him, and his equity of

(1) (1886) I. L. R., 8 All., 105.
(2) (1896) I. L. R., 20 Mad., 35.
(3) (1894) I. L. R., 22 Calc., 33
(4) (1896) I. L. R., 23 Calc., 795.
(5) (1903) I. L. R., 30 Calc., 599.
(6) (1897) 1 C. W. N., 453.
(7) (1905) I. Cal., L. J., 674.
(8) (1905) 2 Cal., L. J., 574.
(9) (1905) I. L. R., 32 Calc., 891.
(10) (1906) I. L. R., 33 Calc., 425.
(11) (1898) I. L. R., 27 Bom., 701.
(12) (1905) I. L. R., 30 Bom., 166.

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redemption in the second or third mortgage made by him, and if such mortgagee is permissible, it would be a denial of justice to permit such a mortgage but to give no decree for sale when the mortgagee sues for it.

If chapter IV of the Transfer of Property Act deals only with cases of mortgages of "property," in the sense in which that term is defined in Mata Din's case, there is no statute law dealing with mortgages of lesser rights in such property, and the general law which prevailed before the Transfer of Property Act came into force, under which such mortgages were permissible, has not been abrogated, and if the narrower construction placed on the term 'immovable property' be correct, a decree for sale of mortgage rights must, it is submitted, still be given to a sub-mortgagee. The earlier Full Bench ruling in *Raghunath Prasad* v. *Jurawan Rai* (1) lays down the correct rule of law.

Munshi *Gulzari Lal*, in reply, called attention to the definition of 'immovable property' in the General Clauses Act, which includes benefits to arise out of land but not 'interests in land.' The term 'immovable property' or 'property' in the Transfer of Property Act would not therefore include mere interests in such property unless specifically mentioned. Thus the words 'property comprised in the mortgage' in section 85 of the Act would mean the property, certain interests in which form the subject of mortgage. The Full Bench case of *Mata Din Kasodhan* v. *Kazim Husain* therefore rightly holds that all persons who have any interest in the property, and not only those who have a right in the particular interest mortgaged are necessary parties to a suit upon a mortgage under chapter IV of the Transfer of Property Act.

STANLEY, C. J.—The question before us was referred to a Full Bench on the ground of its importance, and is whether a sub-mortgagee of mortgagee rights is entitled to a decree for sale of those rights. I understand this to be whether, when a mortgagee has sub-mortgaged his interest in the property mortgaged to him to a sub-mortgagee, the sub-mortgagee is entitled to sell the interest in the property of his sub-mortgagor without impleading the mortgagor and foreclosing his equity of redemption;

(1) (1886) I. L. R., 8 All., 105.

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whether in fact the interest in the property mortgaged which has passed to the sub-mortgagee can be sold, leaving the equity of redemption outstanding in the mortgagor.

Before I deal with this question it may be well to ascertain what is the nature of a mortgage and sub-mortgage as usually met with in these Provinces. We rarely come across a mortgage in the English form, namely, a mortgage by way of conveyance of his land by the mortgagor to the mortgagee with a *proviso* that on repayment of the sum advanced by the mortgagee on a certain day, the mortgagee shall re-convey the estate. In a sub-mortgage of such a mortgage according to the English form, the security comprises the personal covenant of the sub-mortgagor to pay the sum advanced to him by his sub-mortgagee and also a transfer of the original mortgage debt and mortgaged property with the benefit of all powers and remedies contained in the original mortgage, to secure repayment of the mortgage debt. According to the practice in these Provinces a mortgagor does not in terms convey to the mortgagee the mortgaged property, but merely hypothecates the property as security for the money advanced to him. The transaction takes the form of an hypothecation or pledge merely of the property. So in the case of a sub-mortgage, the sub-mortgagor merely hypothecates his interest in the property mortgaged to him as security for the repayment of an advance made to him by the sub-mortgagee.

If the rule laid down by the majority of the Full Bench of this Court in the case of *Mata Din Kasodhan* v. *Kazim Husain* (1) is accepted, it appears to me that the question before us must be answered in the negative, for it seems to follow as a logical consequence of that decision that the rights of a sub-mortgagee cannot be sold by the Court separately and apart from the interest in the land of the original mortgagor. Under ordinary circumstances, and notwithstanding the fact that this decision has not been accepted by the other High Courts, I should be disposed, on the well recognized and convenient rule *stare decisis*, to accept and follow it. But we are confronted by an earlier Full Bench decision which is wholly inconsistent with it: that is the case of *Raghunath Prasad* v. *Jurawan Rai* (2). In

(1) (1891) I. L. R., 13 All., 482. (2) (1886) I. L. R., 8 All., 105.

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view of this conflict of authority it becomes our duty to consider and determine which of these two authorities commends itself to us as correct.

In *Mata Din Kasodhan's* case, Edge, C.J., and Straight, Tyrrell and Knox, JJ., Mahmood, J., dissenting, held that the term 'property' as used in the Transfer of Property Act meant "the actual immovable property mortgaged, and not merely particular rights and interests in such property as distinguished and separated from the actual immovable property itself," and that consequently a subsequent mortgagee could not bring to sale under his mortgage-deed the property mortgaged to him without first redeeming prior mortgages. As I understand the decision, the majority of the Court held that a sale under the Act can only be of the land itself, including all rights and interests of as well prior as of puisne incumbrancers, and that all parties having any estate or interest in the land sought to be sold must be impleaded, so that their estates and interests may be transferred to or may pass to a purchaser.

If full effect is given to this decision it seems to follow that a sub-mortgagee cannot have a sale under the Act of his interest in the property sub-mortgaged to him subject to the rights of the original mortgagor, that is, to his equity of redemption. In the earlier case, which came before Petheram, C.J., and Straight, Oldfield, Brodhurst and Tyrrell, JJ., the appeal was from a decision of Oldfield, J., from whom Mahmood, J., had dissented, and arose out of a suit brought by a puisne mortgagee to enforce the payment of his debt by sale of the mortgaged property. Oldfield, J., had held that the prior mortgage not having been extinguished afforded a defence against the claim, whilst Mahmood, J., was of opinion that "a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security, so long as such enforcement does not clash with the rights secured by the prior mortgage" (I.L.R., 7 All., 568). In his judgment Mahmood, J., observed:—"It seems to me that, notwithstanding the mortgage, the mortgagor or the holder of the equity of redemption can alienate his rights by private sale, and it follows that he can do so by hypothecation. Such sale or hypothecation would, of course, be subject to the

prior mortgage and could in no manner disturb the priority of lien possessed by the prior incumbrancer, or militate against his interests. So long as there can be no conflict between the rights created by the prior and the puisne incumbrances, it appears to me that property subject to two or more incumbrances can be sold in enforcement of any one of them, and the purchaser in such sale would acquire such right as the position of the incumbrance with reference to the rule of priority could convey" (page 574 of the Report). The Court unanimously upheld the view of Mahmood, J., and confirmed the decree of the Munsif, with a slight modification whereby it was provided that "the interest of the plaintiff as second mortgagee only" should be sold.

In his judgment in *Mata Din Kasodhan's* case, Edge, C.J., points out that in the earlier case the mortgage was usufructuary, and that "if it enured with all its benefits to the defendants, was one which the plaintiff when he brought his suit was not entitled to redeem," and he observes, at p. 447, as follows:—"It does not appear whether the fact that the mortgage was an usufructuary mortgage with possession distinguished, in the opinion of the Full Bench, that case from one in which the prior incumbrance was a simple mortgage ripe for redemption." He then says:—"Indeed it seems to me very doubtful whether the case was argued at all before the Full Bench, it having been assumed that the difference of opinion between Oldfield, J., and Mahmood, J., had arisen from some misapprehension as to the facts of the case." Mr. Justice Straight, who was a party to both appeals, nowhere in his judgment in *Mata Din Kasodhan's* case alludes to the earlier authority. It seems to me unlikely that the learned Chief Justice and Judges decided a question, as to which two of their colleagues were in conflict, without full knowledge of the facts and after careful consideration.

In the view which I take it is immaterial whether the prior incumbrance be an usufructuary or a simple mortgage. In either case a sale at the instance of a puisne mortgagee would be subject and without prejudice to the rights of the prior incumbrancer.

The question before us largely turns on the meaning of the erm 'mortgaged property' as used in the Transfer of Property

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Law of Property Act, 1881, in which the powers of a mortgagee are defined. Section 19 of that Act enumerates the powers incident to the estate or interest of a mortgagee, and, amongst others a power when the mortgage money has become due to sell or to concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior charges or not. What is meant in this section by 'the mortgaged property' is to be found in section 21, which provides that a mortgagee exercising the power of sale conferred by this Act shall have power by deed to convey the property sold for such estate and interest therein as is the subject of the mortgage free from all estates, interests and rights to which the mortgage has priority but subject to all estates, interests and rights which have priority to the mortgage, et cetera. Under these provisions it is clear that in England a mortgagee can sell an interest in property as distinguished from the property itself. This section closely corresponds with section 69 of the Transfer of Property Act, to which I shall presently refer. In *In re Hodson and Howe's Contract* (1) it was held by North, J., and affirmed on appeal, that an equitable mortgagee by deed who sells in exercise of the power of sale conferred by the Conveyancing Act, 1881, cannot convey the legal estate vested in the mortgagor. North, J., observes in his judgment:—"What is subject to the mortgage is the equitable estate and interest vested in the mortgagee. He can convey all he has; but he cannot convey the legal estate." The Lords Justices Cotton, Lindley, and Bowen affirmed this decision (35 Ch. D., 668). From these authorities I gather that in England it is not incumbent on a puisne mortgagee or sub-mortgagee, if he seeks to realize his security, to implead the prior incumbrancer or mortgagor respectively, but he may have a sale of his mortgagee rights. No doubt in the case of a derivative mortgage, that is, a sub-mortgage, it is usual to implead the original mortgagor and to foreclose the original mortgagor as well as the sub-mortgagor. The ordinary decree in such a case directs an account to be taken of what is due to the original mortgagee, and next what is due to the sub-mortgagee, and further directs that upon payment of the latter

(1) (1887) L. R., 35 Ch. D. 668.

amount to the sub-mortgagee not exceeding the amount due to the original mortgagee and of the residue, if any, of what is due to the original mortgagee, both of them shall re-convey. In default of payment the original mortgagor is foreclosed and the sub-mortgagee is ordered to re-convey the property to the original mortgagee on payment by the latter of what is due on foot of the sub-mortgage, and in default of payment the original mortgagee is foreclosed. The ordinary form of decree in England is to be found in Seton on Decrees, 5th Edition, p. 1730. This is undoubtedly a convenient form of decree, and I think that the practice of impleading the mortgagor as well as the sub-mortgagor may with advantage be followed. But the question before us is whether or not it is absolutely necessary that both these parties should be impleaded. According to the authors of Seton on Decrees the derivative mortgagee may foreclose the original mortgagee without making the original mortgagor a party (see Note, page 1733). The authors of Daniell's Chancery Practice also recognize the right of a sub-mortgagee to foreclose his mortgagor without making the original mortgagor a party (see 6th Edition, Vol. II, page 1337). Now the remedy by foreclosure or sale, I may observe, stands on the same footing. Under section 67 of the Transfer of Property Act the mortgagee, at any time after the mortgage money has become payable and before decree for redemption has been made, has a right to obtain from the Court an order for foreclosure or of sale.

I now turn to the sections of the Transfer of Property Act which seem to me to throw some light upon the question before us.

Section 58 defines a mortgage as "the transfer of an interest in specific immovable property for the purpose of securing the payment of money," et cetera. Not merely, therefore, may specific immovable property be transferred by way of mortgage, but an interest therein may also be the subject of mortgage. 'Mortgaged property' may be not merely 'actual immovable property' but 'an interest' in such property.

Section 60 provides that on redemption the mortgagee is either to re-transfer the 'mortgaged property' to the mortgagor, or to execute an acknowledgment in writing as therein specified. Now a mortgagee cannot re-convey a larger interest than he has got.

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Therefore if the mortgage be a puisne mortgage, the mortgagee can only re-convey the property subject to the prior mortgage. He cannot re-convey the actual immovable property.

Next, section 65 provides that in the absence of a contract to the contrary the mortgagor shall be deemed to contract with the mortgagee *inter alia (a)* "that the interest which the mortgagor professes to transfer to the mortgagee subsists and that the mortgagor has power to transfer the same;" *(b)* "where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions, et cetera, have been paid, performed," et cetera, and *(c)* "where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance," et cetera. This section recognizes the validity of a mortgage of an interest in land, including a lease-hold interest. A lessee is not owner of the land itself, but is merely entitled to a right to use and enjoy the land for a limited time, or in perpetuity. In England the interest of a lessee is a chattel interest; it is personal and not real estate at all. It is much the same in India; a lease-hold interest is not so much immovable property as a right to enjoy immovable property. It is an interest in immovable property. In the Transfer of Property Act a lease is defined 'as a transfer of a right to enjoy' immovable property (section 105).

The use in section 65 of the words 'the interest which the mortgagor professes to transfer' and 'where the mortgaged property is a lease,' seems to me to indicate that the powers conferred by the Act are not confined merely to the actual physical object but embrace any rights or interests subsisting therein which are the subject of a mortgage.

In section 69, to which I have already referred, which treats of the power conferred by a mortgage deed to sell property without the intervention of the Court, provision is made for the application of the money arising from the sale. It declares that "the money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall in the absence

of a contract to the contrary be held," et cetera. This implies that a sale out of Court at all events can be made subject to prior incumbrances.

Section 86, which deals with foreclosure and sale, provides in the case of payment of the mortgage debt, for the "transfer of the property to the mortgagor free from all incumbrances created by the plaintiff or any person claiming under him, or when the plaintiff claims by derived title, by those under whom he claims." The words 'derived title' would apply to a sub-mortgage, which is a derivative mortgage, and seem to manifest that where a sub-mortgagee is plaintiff in a foreclosure suit the transfer to be made to the sub-mortgagor on payment is only of the interest which has been mortgaged, that is, the sub-mortgagee rights.

Section 96 is an important section. It is introduced by the heading—"Sale of property subject to prior mortgage"—and provides that "if any property, the sale of which is directed under Chapter IV, is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same," et cetera. This section indirectly recognizes the right of a puisne mortgagee to sell the mortgaged property subject to prior incumbrances. The learned Chief Justice Sir John Edge says of this section that it "is not happily worded" and that he regards the words "subject to a prior mortgage" in section 96 as mere words of description. I must confess that I do not clearly understand the meaning of this last observation. It appears to me that in the heading as well as in the body of the section itself the Legislature has with sufficient clearness intimated its meaning.

From the foregoing sections it seems to me apparent that where the words 'the mortgaged property' are used throughout chapter IV, they mean the interest in specific immovable property which the mortgagor professes to transfer, whatever that interest may be.

But reliance has been placed on the part of the respondents on section 85. It provides that "subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage;

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provided that the plaintiff has notice of such interest." It is contended that the section renders it imperative that all persons who have a prior interest in specific immovable property, a derivative or puisne mortgage of which is sought to be enforced, must be joined as parties to a suit for sale, and that the intention of the Legislature was that the actual physical object, that is the land itself, and that alone, can be the subject of a sale. I am unable to yield to this contention. Certainly in the case of a lease-hold interest, the right to enjoy the land, subject to the provisions of the lease, only can be sold, and generally such a construction of the Act appears to me to be wholly inconsistent with the whole tenor of chapter IV, as indicated by the sections to which I have already referred. If all persons having an interest in the land itself must be impleaded in a suit for sale by a mortgagee of a lease-hold interest, the lessor would be a necessary party; and if the absolute estate in the land, and not merely the lease-hold interest, must be sold, then either a sale cannot be had or a lessor is left at the mercy of his lessee and may have his estate taken from him at the instance of a mortgagee from his lessee. This surely cannot have been intended. And if it be not so, and only the leasehold interest can be sold at the suit of a mortgagee of that interest, then, as the lease merely gives a right to enjoy the property for a certain time or in perpetuity, the land itself cannot be sold at the instance of such mortgagee. It seems to me that the words 'property comprised in a mortgage,' as used in section 85, were probably intended to denote no more than the estate or interest which is the subject of any particular mortgage, that is, if the mortgage be a mortgage of the absolute estate in the land, then the land itself, if it be a puisne mortgage, then the interest in the land of the mortgagor, that is, the equity of redemption. This would give the words the same meaning as the words 'the mortgaged property' as used in section 25 of the English Conveyancing Act of 1881. In the case of a sub-mortgage, as distinguished from a puisne mortgage, it would, no doubt, be desirable that the mortgagor should be joined as a party to a suit for sale at the instance of a sub-mortgagee. But in this case it will be observed that the interest which is sub-mortgaged is the same interest as that which

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is the subject of the mortgage. In the case of a sub-mortgage according to the English practice, the mortgagor assigns the mortgage debt and conveys the land which is the subject of his mortgage to his sub-mortgagee and in a suit by the sub-mortgagee for foreclosure or sale, the mortgagor is usually impleaded, but, as I have already pointed out, this is not necessary. If this be not necessary in the case of a suit by a sub-mortgagee, it is difficult to see why a puisne mortgagee should not be permitted to enforce his security by a transfer of the interest which has been hypothecated in his favour, that is, by selling the land subject to prior incumbrances. Such a sale can in no way prejudice the rights of the prior mortgagees. Whether a first mortgagee is a person having an interest in the equity of redemption, which alone can be the subject of a subsequent mortgage within the meaning of section 85, is I think open to question. He holds under a paramount title and cannot be prejudiced by a sale of the equity of redemption. But assuming that he is such a person and that he should be joined as a party to a suit to enforce a second mortgage, it by no means follows that a sale cannot be ordered without redeeming him. I do not propose to refer to the earlier cases upon this subject with one exception. They are dealt with at length in the judgments in *Mata Din Kasodhan's* case.

The one exception is the case of *Venatlachella Kandian* v. *Punjanadien* (1) which was decided before the Transfer of Property Act was passed. Turner, C J., in the course of his judgment in that case thus stated the law upon this subject:—"When a second mortgage is created in favour of a person who is not the holder of a first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that dictates the preservation of the right created by the first charge, I am unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the first mortgagee. If the first mortgagee had not acquired the rights remaining in the owner,

(1) (1881) I. L. R. 4 Mad., 213.

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it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale) then a sale should have been ordered of the property to discharge both mortgages, and the proceeds should have been applied to their satisfaction in order of priority; but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance." I am not aware that disapproval of this enunciation of the law has ever been expressed except in *Mata Din Kasodhan's* case. I now come to several recent authorities which support the view which I entertain.

In the case of *Kanti Ram* v. *Kutub-ud-din Mahomed* (1) it was held that 'immovable property,' as used in section 58 of the Transfer of Property Act denotes not only the property itself, as distinguished from any equity of redemption which the mortgagor might possess in it, but includes the rights of the mortgagor at the time of a second mortgage and that a second mortgage, as well as a first mortgage, is a mortgage of specific immovable property under that section. It was also held that in a suit on a mortgage by a second mortgagee to which the prior mortgagee was a party, the plaintiff was entitled to an order for sale of the mortgaged property subject to the lien of the prior incumbrancer. Ghose and Gordon, JJ., adopted the view expressed by the Full Bench of this Court in the case of *Raghunath Prasad* v. *Jurawan Rai*. The same learned Judges followed this decision in *Beni Madhub Mohapatra* v. *Sourendra Mohun Tagore* (2). In *Debendra Narain Roy* v. *Ramtaran Banerjee* (3) a Full Bench of the Calcutta High Court consisting of Maclean, C. J., and Prinsep, Sale, Stevens and Geidt, JJ., unanimously held that a puisne mortgagee is entitled to have a sale of the property comprised in

(1) (1894) I. L. R., 22 Calc., 33. (2) (1896) I. L. R., 23 Calc., 795.
(3) (1903) I. L. R., 30 Calc., 699.

his mortgage subject to the rights of the first mortgagee even after the property had been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. In *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) Rampini and Mookerjee, JJ., held that the term 'property comprised in a mortgage,' as used in section 58 of the Transfer of Property Act, means not the physical object but the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction.

In the Madras High Court the same view was taken in *Muthu Vijia Ragunatha* v. *Venkatachallam Chetti* (2). Subrahmania Ayyar and Davies, JJ., held that a sub-mortgagee is entitled to a decree for sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. In that case the learned Judges expressed disapproval of the definition of the term 'property,' as used in the Transfer of Property Act, accepted by the majority of the Full Bench in the case of *Mata Din Kasodhan* v. *Kazim Husain*

In the case of *Raj Coomary Dassee* v. *Preo Madhub Nundy* (3), Jenkins, J. (now Chief Justice of the Bombay High Court), sitting on the original side of the Calcutta High Court, held that in a suit by a puisne mortgagee on his mortgage a prior mortgagee was not a necessary party, but is a proper party if the puisne mortgagee offer to redeem his mortgage.

I am not aware of any case in any of the High Courts other than this Court, in which the question which is now before us has been considered and been answered in the negative. I do not pause to consider the convenience or inconvenience likely to result whatever be the view which we adopt. This matter is fully discussed in the judgments in *Mata Din Kasodhan's* case and appears to me to be rather a matter for the Legislature than for us, but I am not prepared to admit that the result upholding the view which I entertain would be to multiply or increase litigation. Upon the whole I feel constrained, by the language of the Transfer of Property Act, to hold that in a

(1) (1906) I. L. R., 33 Calc., 425 (2) (1850) I. L. R., 29 Mad., 35.
(3) (1897) 1 C. W. N., 453

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properly constituted suit a puisne mortgagee or sub-mortgagee may have a sale of the interest mortgaged or sub-mortgaged to them respectively, subject in the case of a puisne mortgage to the rights of a prior incumbrancer and subject in the case of a sub-mortgage to the rights of redemption of the orignal mortgagor.

For these reasons I would answer the question submitted to us in the affirmative.

KNOX, J.—The question referred is "whether a sub-mortgagee of mortgagee rights in immovable property can get a decree for sale of the mortgaged property, *i.e.*, of the mortgagee rights of his mortgagor in enforcement of his mortgage." I am now prepared to answer this question in the affirmative, and I do not know that I can add much that is of profit after the very exhaustive judgment of the Hon'ble the Chief Justice. But as one of the Judges who took part in the judgment of *Mata Din Kasodhan* v. *Kazim Husain* (1) it is incumbent upon me to state briefly why the view which then commended itself to me no longer commends itself. I was then oppressed with the feeling that it was necessary and that the Legislature had intended in enacting section 85 of the Act to "bring together into one suit," specially when that suit was for sale of the mortgaged property, all existing incumbrances on the physical property whole and undivided, and did not attach sufficent weight to the words 'comprised in a mortgage' which occur in section 85 of the Act. Comparing with greater care than I then did the several sections in which the word 'property' occurs in the Act, especially sections 58, 86, 87 and 88, and more especially section 6 and the following sections in chapter II of the Act, I am now prepared to hold that the words 'the property comprised in a mortgage,' used in section 85, relate only to that or those interest or interests which has or have been the subject of mortgage in the particular suit, whatever the nature of those interests may be, whether proprietary rights or only a certain right or interest in the property known as the equity of redemption, and so forth. The language used in section 96 of the Act seems to admit only of this interpretation and of no other.

(1) (1891) I. L. R., 13 All., 432

Taking this view of the word 'property' as used in Chapter IV, I wish to express my full concurrence in the answer proposed by the learned the Chief Justice and in the reasons as stated by him.

BANERJI, J.—The question referred to the Full Bench is "whether a sub-mortgagee of mortgagee rights in immovable property is entitled to a decree for the sale of the mortgagee rights of his mortgagor in enforcement of his mortgage." I should have had no difficulty in answering the question had it not been for the principle laid down by the majority of the Full Bench in the case of *Mata Din Kasodhan* v. *Kazim Husain* (1) on the basis of which *Ganga Prasad* v. *Chunni Lal* (2) and other subsequent cases were decided. The particular question before us did not arise and was not decided in the case of *Mata Din Kasodhan* v. *Kazim Husain*. Unless, therefore, we approve of the rule laid down in that case I see no reason why we should apply that ruling to any question which was not directly in issue and was not actually determined in that case. The point for determination in that case was whether a subsequent mortgagee could bring to sale the property mortgaged to him without redeeming the prior mortgage, and that is the question which was decided by the Full Bench. The ruling in that case therefore does not preclude us from considering and determining the question referred to us. We are of course bound to pay to the reasoning by which the decision in that case was arrived at the respect which pronouncements by eminent Judges deserve, although that reasoning has not, it may be observed, met with the approval of the High Courts of Calcutta and Madras.

The decision of the question before us depends, it seems to me, on the meaning to be placed on the words 'mortgaged property' in section 67 of the Transfer of Property Act (No. IV of 1882). By that section in the absence of a contract to the contrary the mortgagee has at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited * * a right to obtain from the Court an order * * that the property be sold. So that every mortgagee

(1) (1891) I. L. R., 13 All., 432. (2) (1895) I. L. R., 18 All., 115.

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who holds a simple mortgage is entitled to obtain a decree for the sale of the mortgaged property. In the case of a sub-mortgage the property mortgaged to the sub-mortgagee is not the land itself but the mortgagee's interest which the sub-mortgagor holds in that land. It is this interest which is the mortgaged property. Unless, therefore, we can hold that nothing short of an actual physical object can form the subject of a mortgage, a sub-mortgagee would under the provisions of section 67 be entitled to sue for and obtain a decree for the sale of the property mortgaged to him, namely, the mortgagee rights of the mortgagor. It was no doubt held by the majority of the Court in *Mata Din* v. *Kazim Husain* that "the term 'property' as used in chapter IV of Act IV of 1882, means an actual physical object and does not include mere rights relating to physical objects." But with great deference I am unable to assent to that view. It is opposed to the definition of a mortgage as contained in section 58. Under that section, "a mortgage is the transfer of an interest in specific immovable property," and is in fact a pledge of property for the repayment of a debt. As the learned Chief Justice has pointed out in his elaborate and exhaustive judgment, which I have had the advantage of perusing, the word 'property' has a comprehensive meaning and is "indicative and descriptive of every possible interest which a party can have" [*Per Langdale*, M. R., in *Jones* v. *Skinner* (1)], and there is no reason to assume that the word has been used in the Transfer of Property Act in a restricted sense. On the contrary, it is manifest from the provisions of sections 65, 71, 74, 75 and 96 that it has not been so used, and that any interest in immovable property, and not the physical object itself only, can be mortgaged. Sections 65 and 71 show that the mortgaged property may be a lease for a term of years. From sections 74 and 75 it appears that there may be a second or other subsequent mortgage, which in reality is not a mortgage of the physical object itself but of the interest in it which remained in the mortgagor after he had made a prior mortgage, that is, of his right of redeeming the prior mortgage. And section 96 shows that property may be sold under the Act subject to a prior mortgage. The point has been so fully dealt with by the learned

(1) (1885) 5 L. J. Ch., 84, at p. 90.

Chief Justice that I deem it unnecessary to dwell on it further. A sub-mortgage is a well known form of transfer both under the English law and in this country. In England "where there is a sub-mortgage the security will comprise, first, the personal covenant of the sub-mortgagor; secondly, the transfer of the original mortgage debt and mortgaged property, subject to redemption; * * thirdly, a power of sale enabling the sub-mortgagee to dispose of the original mortgage debt and security"—(Robbins' Law of Mortgages, Vol. II, p. 830). In this country, except in the case of an English mortgage, a sale can only be effected through the intervention of a Court. So that, unless there is anything in the Transfer of Property Act to the contrary, a sub-mortgagee is entitled to ask for and obtain a sale of the original mortgage debt and security. I can find nothing in the Transfer of Property Act which forbids a sub-mortgage. In the case of a sub-mortgage the property which is the subject of the mortgage is the interest of the sub-mortgagor as the original mortgagee. And as it is this interest which is the mortgaged property, the sub-mortgagee is entitled under section 67 of the Act to an order for the sale of such interest. Any other view would place a sub-mortgagee in the same position as the holder of a simple money debt, and the pledge made in his favour would be no security at all. A consideration of the provisions of sections 85, 86, 87, 88, and 89, does not in my judgment lead to a different result. Section 86, and the subsequent sections refer to the 'mortgaged property' which in the case of a sub-mortgage is the mortgagee interest of the sub-mortgagor. Section 85 only requires that all persons having an interest in the property comprised in the mortgage of whose interest the mortgagee has notice should be joined as parties to a suit upon the mortgage. The property comprised in a sub-mortgagee's mortgage being the mortgagee rights of his mortgagor, only those persons are necessary parties to the sub-mortgagee's suit who have an interest in those rights. Even the original mortgagor is not a necessary party to such a suit. It is only in cases in which he is liable to be foreclosed of his right of redemption and the derivative mortgagee seeks to foreclose him that he should be made a party. Similarly in the case of a puisne mortgage a prior mortgagee is not a necessary party, unless the puisne mortgagee seeks to redeem

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him in the exercise of his powers under section 74 or section 91 or desires that the property should be sold free from the prior mortgage with the prior mortgagee's consent under section 96. This appears to be the rule not only in the Courts in England, but also in the Courts in America (see Jones on Mortgages, Vol. II, para. 1589), and in my judgment the Transfer of Property Act does not lay down a different rule. It seems to me that what section 85 requires is that all persons should be joined as parties whose rights may be affected by the decree in the suit. A prior mortgagee in the case of a suit for sale by a subsequent mortgagee or the original mortgagor in the case of a similar suit by a sub-mortgagee, cannot be prejudiced by the decree in the suit and is not therefore a necessary party. Section 85 was undoubtedly enacted with a view to prevent multiplicity of suits, but that object will not, as it seems to me, be defeated by holding that interests in immovable property which fall short of the complete ownership of the property itself can be mortgaged and can be sold at the instance of the mortgagee. Such interests may be of considerable value, and I see no reason to assume that the Legislature in enacting the Transfer of Property Act intended that they cannot be regarded as property and cannot be the subject of a mortgage. If such interests can be mortgaged,—and there cannot be any doubt that they can be mortgaged,—those interests are mortgaged property within the meaning of section 67, and are under that section liable to sale. The question of the rights of a subsequent mortgagee, which was directly in issue in *Mata Din Kusodhan* v. *Kasim Husain*, is not before us in this case. We have only to consider the rights of a derivative mortgagee, and I am unable to hold that such a mortgagee has no right to bring to sale the interests mortgaged to him and is in no better position than an ordinary creditor who holds no security for the money advanced by him. I have therefore no hesitation in answering in the affirmative the question referred to us.

BURKITT, J.—The question which has been referred for the consideration of the Full Court in this case is "whether a sub-mortgagee of mortgagee rights in immovable property is entitled to a decree for the sale of the mortgagee rights of his mortgagor

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in enforcement of the mortgage." That is the only question we have to consider. I do not desire to travel beyond it.

Having had an opportunity of perusing the judgment of the learned Chief Justice on the question referred to us, I fully concur in it and for the reasons by which it is supported. The rule laid down in *Mata Din Kasodhan* v. *Kazim Husain* (1) cannot in my opinion be supported. I therefore answer the question in the affirmative.

I would add that as no question touching section 85 of the Transfer of Property Act has been referred to us, I refrain from expressing any opinion as to the meaning or effect of that section.

AIKMAN, J.—Gaya Prasad and Mussammat Jasoda Kunwar executed a mortgage-deed in favour of the predecessor in title of the plaintiffs respondents as security for money lent. By this deed certain immovable properties were mortgaged as security for the loans. As additional security the mortgagors further mortgaged their mortgagee right in six mortgages held by them.

The plaintiffs sue to recover their money by sale of the mortgaged property. Amongst the defences raised to the suit there was a plea that a mortgage of mortgagee rights is invalid according to law and that no decree can be passed for the sale of mortgagee rights. The lower Court gave the plaintiffs a decree for sale of the immovable property mortgaged to them, and also for sale of the mortgagee rights referred to above. Against that decree the defendant has appealed to this Court.

The fourth plea in the memorandum of appeal is that no decree could be legally passed for the sale of the mortgagee rights. The learned counsel for the appellant in supporting this plea relied on a case of this Court—*Ganga Prasad* v. *Chunni Lal* (2). That was a case in which a sub-mortgagee had got a decree for the sale, not of his mortgagor's rights, but for the sale of the property mortgaged to the plaintiff's mortgagor by the original mortgagor. The learned Judges who decided that case held that the sub-mortgagee was not entitled to such a decree, which was in fact a decree for the sale of the property which had not been mortgaged to him, although a different conclusion was arrived at in

(1) (1891) I. L. R. 13 All., 432. (2) (1895) I. L. R., 18 All., 313.

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the case reported at page 35, I. L. R., 20 Mad. I entirely concur in the view taken by this Court, and I agree in the opinion expressed in the case reported in I. L. R., 20 Bom., 549, that there is no privity between the sub-mortgagee and the original mortgagor. But the learned Judges who decided the case of *Ganga Prasad* v. *Chunni Lal* went further than was necessary for the decision of the question before them, and stated broadly that the *sole right* which the plaintiff had as sub-mortgagee was to get a decree for money against his mortgagor. This dictum, which has been followed in subsequent cases, though sometimes with considerable hesitation, undoubtedly supports the plea taken in the memorandum of appeal, and if it is right, the decree of the Court below, so far as it directs the sale of the mortgagee rights must be set aside. In consequence of the doubts entertained by the Bench before whom the present appeal was argued as to the correctness of the proposition of law laid down in the case cited above, the question has been referred to the Full Bench as to whether a sub-mortgagee is or is not entitled in enforcement of his mortgage to a decree for the sale of the mortgagee rights of his mortgagor.

The learned Judges who decided the case of *Ganga Prasad* v. *Chunni Lal* do not go so far as to say that a sub-mortgage is invalid or illegal. But the effect of their dictum, if it is a correct proposition of law, is to render sub-mortgages abortive and utterly valueless as securities.

This is to my mind a very startling result. The right of a mortgagee to pledge or hypothecate his mortgagee rights was recognized by Roman Law. See Sandar's Justinian, 2nd edition, page 216.

A sub-mortgage, or, as it is sometimes called, derivative mortgage, is recognized as valid security in English Law. Coote in his well-known work on Mortgages says, at p. 837 of his 7th edition:—"A mortgagee may assign the mortgage debt by way of absolute transfer or by way of sub-mortgage," and at p. 849 he says:—"When there is a sub-mortgage, the security comprises a power of sale enabling the sub-mortgagee to dispose of the original mortgage debt and security." This view is fully supported by the cases cited.

Sub-mortgages are also recognized in America, see section 139 of Jones on Mortgages, 5th edition, where it is said:—"There may be a mortgage of a mortgage. One may mortgage an interest in real estate which he himself holds in mortgage."

I have not been able to discover any reported case of the Calcutta High Court in which the question of a sub-mortgage has been considered. But the validity of a sub mortgage and the right of a sub-mortgagee to enforce his security have been recognized by the High Courts of Bombay and Madras and by the Chief Court of the Punjab.

In *Mata Din Kasodhan* v. *Kazim Husain* (1), Mahmood, J., says (at page 480):—"I am wholly unaware of any authority in the Indian Law of Mortgages as it stood before the Transfer of Property Act (IV of 1882) or as it now stands since the enforcement of that enactment to justify the view that . . . . . a sub-mortgage is prohibited by law." I can find nothing in the Transfer of Property Act which would render a sub-mortgage invalid, or prevent its enforcement as a lawful contract.

For the above reasons I am of opinion, with all deference to the learned Judges who decided the case of *Ganga Prasad* v. *Chunni Lal*, that their dictum to the effect that the only right which a sub-mortgagee has is to get a decree for money is not a correct proposition of law.

But it is contended by the learned counsel for the appellant that the dictum in *Ganga Prasad* v. *Chunni Lal* is a logical consequence of what was held by the majority of the Full Bench in the case of *Mata Din Kasodhan*, and the force of this contention must be admitted. I am very unwilling to disturb the authority of a case which, though it has been dissented from by the Calcutta and Madras High Courts, has been looked on as settled law in these Provinces since 1891, and which has undoubtedly had a salutary effect on the multiplication of suits on mortgages, which as Straight, J., observes in his judgment in that case, "had become a perfect pest to the Courts which had to administer the law." But if the views expressed by the majority lead, as I think they do, to the startling conclusion that any one who lends money on the hypothecation of mortgagee rights gets no security whatever, it

(1) (1891) I. L. R., 13 All., 482.

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becomes necessary to consider whether those views are a correct exposition of the law. With all deference to the learned Judges who expressed those views, I am forced to hold that they are not.

It was held by the majority of the Full Bench that the word 'property,' as used in Chapter IV of the Transfer of Property Act, means an actual physical object, and does not include mere rights relating to physical objects; that the only thing which can be sold under a mortgage decree is specific immovable property, and that that cannot be sold subject to a prior mortgage. In my opinion this does not correctly express the intention of the Legislature. From section 65 (*d*) of the Act it is clear that the Legislature recognized the mortgage of a lease as a valid contract. But if it is a valid contract, how is it to be given effect to unless the sale of the lease-hold can be enforced under the mortgage?

In the Transfer of Property Act the Legislature has divided the Act into sets of sections with headings prefixed. These headings may be regarded as preambles to those sets of sections and may therefore be legitimately consulted for the purpose of ascertaining the meaning of the Statute—*vide* Maxwell on the Interpretation of Statutes, 4th edition, p. 75. One set of sections in chapter IV of the Act is headed "Sale of Property subject to prior mortgage." If it was the intention of the Legislature that property should not be sold subject to a prior mortgage, then, as observed by Edge, C.J., at p. 457 of the judgment in *Mata Din Kasodhan's* case, the following section is "not happily worded." If such was the intention of the Legislature they might have made their intention clear by framing this part of the Act (on the model of the well-known chapter on the Snakes of Iceland) as follows:—"Sale of Property subject to prior mortgage. Section 96. No property shall be sold subject to a prior mortgage."

In my opinion a mortgage of mortgagee rights is a perfectly legal contract and a mortgagee of such rights is entitled under section 67 of the Act to enforce the contract and to obtain an order for the sale of the property mortgaged to him, that is, to an order for the sale of the mortgagee rights.

I would therefore answer in the affirmative the question referred to the Full Bench.

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RICHARDS, J.—The question would, I think, be quite free from difficulty but for the ruling in *Mata Din's* case. It seems to me that we cannot hold the ruling in that case to be correct and answer this question in the affirmative. In the interval between the conclusion of the arguments and the delivery of judgment to-day, I have had the advantage of reading and considering the judgment just now delivered by the Chief Justice. I entirely concur with that judgment. I concur with the rest of the Court in saying that the question referred should be answered in the affirmative.

BY THE COURT.—The order of the Court is that the question referred to us be answered in the affirmative.

APPELLATE CIVIL.

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March 25.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

GANGA PRASAD AND ANOTHER (PLAINTIFFS) *v.* GANGA BAKHSH SINGH AND OTHERS (DEFENDANTS) *

Civil Procedure Code, sections 320, 325A—Ancestral property—Execution of decree—Property taken under management of the Collector—Disabilities of proprietor pending term of management.

In pursuance of the power conferred upon him by rules framed by Government under section 320 of the Code of Civil Procedure, the Collector sanctioned a lease of certain zamindari property of the judgment-debtor for a period of seventeen years, the lease being executed in the name of the judgment-debtor but with the permission of the Collector.

Held that the disabilities imposed by the first paragraph of section 325A of the Code affected the judgment-debtor during the pendency of such lease; and *semble* that such disabilities continued so long as any of the debts for the satisfaction of which the judgment-debtor's property was taken under management by the Collector remained unpaid.

THE facts of this case are as follows :—

One Nath Bakhsh Singh having several decrees being executed against him, his zamindari property was taken under the management of the Collector. On the 10th of May 1884 a lease of this property was made in favour of one Bindhachal Shukul, in the name of Nath Bakhsh Singh, but purporting to be made with the consent of the Collector. Subsequently, namely, on the

* First Appeal No 58 of 1905 from a decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 22nd of December 1904.

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GANGA PRASAD v. GANGA BAKHSH SINGH.

31st of May 1885, and the 10th of January 1890, Nath Bakhsh Singh executed two mortgages affecting the property leased in favour of Ganga Prasad and Thakur Prasad. On suit by the mortgagees for realization of the mortgage debts due on these two deeds, Bindhachal Shukul, one of the defendants, resisted the suit upon the ground that section 325A of the Code of Civil Procedure was a bar to the execution of the two mortgages sued on. The Court of first instance (Subordinate Judge of Gorakhpur) upheld this contention in respect of the mortgage of 1885, but gave the plaintiffs a decree upon the later mortgage, holding that it had been executed after the property had ceased to be under the management of the Collector. From this decree the plaintiffs appealed to the High Court in respect of the mortgage of 1885.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal*, for the appellants.

Pandit *Moti Lal Nehru*, Munshi *Kalindi Prasad* and Babu *Iswar Saran*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit for sale on two mortgages, dated respectively the 31st of May, 1885, and the 10th of January 1890, executed by Nath Bakhsh Singh in favour of the plaintiffs Ganga Prasad and Thakur Prasad. One of the defendants, Bindhachal Shukul, pleaded that, before the execution of the mortgages, decrees had been put into execution against the mortgagor and the property placed under the management of the Collector, and that consequently section 325A of the Code of Civil Procedure was a bar to the execution by the mortgagors of the two mortgages sued on. The Court below held that the provisions of this section barred the claim in respect of the mortgage of 1885, but held that the mortgage of 1890 was valid, inasmuch as that mortgage was executed after the property had ceased to be under the management of the Collector. This appeal has been preferred against this decree so far as it dismissed the claim under the mortgage of 1885. The case put forward on behalf of the appellants is that a lease of the property in dispute was executed in favour of the defendant Bindhachal Shukul, on the 10th of May 1884, for a term of 17 years, and that so soon as that lease was executed the powers of the Collector ceased and therefore it was in the

competency of the mortgagors to execute the mortgage of 1885. We find on turning to the lease of 1884, that it was not a lease by the Collector but a lease by the judgment-debtor, Nath Bakhsh Singh, in his own name with the consent of the Collector. Section 325A provides that so long as the Collector can exercise or perform in respect of the judgment debtor's immovable property any of the powers or duties conferred upon him by sections 322—325 (inclusive), the judgment-debtor or his representatives in interest shall be incompetent to mortgage, charge, lease, or alienate such property except with the written permission of the Collector. It appears to us that the view taken by the Court below is correct. The property was under the management of the Collector, notwithstanding the fact that the lease of the 10th of May 1884 was made with his consent. If the lease had determined, for example, by reason of non-payment of rent, it would have been the duty of the Collector under the Code to make arrangements for the management of the property, either by himself or by granting a lease. We are further disposed to think that, irrespective of the lease of 1884, the property was, under the provisions of the Code of Civil Procedure, under the management of the Collector so long as any of the debts in respect of which execution had issued, remained unsatisfied with effect from the date when the decrees were transferred to the Collector for execution. We, therefore, upholding the view of the Court below, dismiss this appeal with costs.

Appeal dismissed.

1907
March 36.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

UMRAO SINGH (DEFENDANT) *v.* HARDEO AND ANOTHER (PLAINTIFFS) *

Suit to set aside a decree on the ground of fraud—No further relief claimed—Jurisdiction.

Save under special circumstances, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. *Mewa Lall Thakur* v. *Bhughun Jha* (1), *Abdul Mazumdar* v. *Mahomed Gazi* (2), *Pran Nath Roy* v. *Mohesh Chandra Chowdhry Moitra* (3), *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee*(4), *Behari Lal* v. *Pokhe Ram* (5), *Nistarini Dasee* v. *Nundo Lall Bose* (6) and *Bibee Soloman* v. *Abdool Aziz* (7) referred to.

THE facts out of which this appeal arose were as follows :—

The appellant, Umrao Singh, who resides in Calcutta, obtained a decree in the Small Cause Court at Calcutta upon a promissory note against the respondents Hardeo and another. This decree was transferred to Agra for execution. The respondents then instituted a suit in the Munsif's Court at Agra, where they reside, to have the decree obtained in Calcutta set aside on the ground that it was obtained by fraud. The only prayer for relief was that "the decree No. 8833 of 1902, passed by the Small Cause Court Judge in Calcutta on the 21st of June 1902, in favour of the defendant and which the defendant obtained by fraud, may be set aside *(mansukh)* and declared to be void." No other relief whatever was sought.

The Court of first instance found that in the suit in the Small Cause Court at Calcutta there had been no service of summons on the defendants, and that the decree had been obtained by fraud. That court accordingly gave the plaintiff a decree, which was upheld in appeal by the lower appellate Court. The defendant then appealed to the High Court, and this appeal coming before a single Judge of the Court was dismissed. The defendant thereupon instituted the present appeal under section 10 of the Letters Patent of the Court.

* Appeal No. 55 of 1906, under section 10 of the Letters Patent.

(1) (1874) 13 B. L. R., App., 11.
(2) (1894) I. L. R., 21 Calc., 605.
(3) (1897) I. L. R., 24 Calc., 546.
(4) (1901) 5 C. W. N., 559.
(5) (1902) I. L. R., 25 All., 48.
(6) (1899) I. L. R., 26 Calc., 903.
(7) (1879) 4 C. L. R., 266.

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Babu *Parbati Charan Chatterji*, for the appellant.

Munshi *Mohan Lal Sandal*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal under the Letters Patent from the decree of one of our colleagues sitting singly, confirming a decree of the Munsif of Agra, which was upheld by the Subordinate Judge of that district. The facts are shortly as follows:—

The appellant, who resides in Calcutta, obtained a decree in the Small Cause Court at Calcutta, upon a promissory note against the respondents. This decree was transferred to Agra for execution. The respondents then instituted a suit in the Munsif's Court at Agra, where they reside, to have the decree obtained in Calcutta set aside on the ground that it was obtained by fraud. The only prayer for relief was that "the decree No. 8833, of 1902, passed by the Small Cause Court Judge in Calcutta on the 21st of June 1902, in favour of the defendant and which the defendant obtained by fraud, may be set aside (*mansukh*) and declared to be void." No other relief whatever was sought. This fact must be kept in view. Both the lower Courts held that in the Calcutta suit there was no service of the summons upon the defendants, and that the decree was obtained by fraud. On appeal the learned Judge of this Court upheld the decisions of the Courts below. In the course of his judgment he observes:—"It has been admitted (and could not be disputed) that a suit to set aside a decree obtained by fraud is a suit which can be brought In my judgment it is quite clear that such a suit can be brought in any Court which is competent to hear any other dispute between the same parties; in other words, the mere fact that the suit is one to set aside a decree makes no difference so far as the tribunal is concerned." The question for our determination is whether the Munsif of Agra had jurisdiction to entertain a suit in which the sole relief sought for was to have a decree of the Small Cause Court of Calcutta set aside on the ground of fraud. In the case of *Mewa Lall Thakur* v. *Bhujhun Jha* (1) which was a suit to set aside a decree on the ground of fraud, Phear, J., who delivered the judgment of the Court, remarked that it seemed to the Court that the suit had been to a considerable extent

(1) (1874) 13 S.L.R., App., 11.

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misdirected, that the immediate aim of the plaintiff was to get a decree, which was passed against him by a competent Court, set aside on the ground that it was obtained by fraud and collusion," and then says:—"The proper course for obtaining such an object as that is to go to the Court which passed the decree, either within the time specified in section 119 of the Code of Civil Procedure (*i.e.*, Act VIII of 1859) if the circumstances are such as would justify action under that section, or at any time (so that it be done with due diligence) if the ground upon which the decree is sought to be set aside be a good ground for reviewing and altering the judgment upon which the decree was passed. And if the case of the plaintiff be, as it is in the present instance, that the decree was obtained by fraud, no better ground for review could be alleged; though, of course, it need hardly be added that, even in such a case as that supposed, it is necessary for the person aggrieved to apply to the Court for a review with due diligence and without loss of time as soon as reasonably may be after the discovery of the fraud. In saying this we do not in the least desire to question the right of every Court to disregard or rather to consider of no force decrees of other Courts which may be shown to its satisfaction to have been obtained by fraud." He afterwards states that "the proceeding which the plaintiff ought to have adopted for the purpose of obtaining the relief he required was to apply to the Court which passed the decree and to get that Court to rectify the decree or to set aside or to alter it in such a way as right and justice required." In later cases it has been held that a decree obtained by fraud may be set aside in a separate suit, but so far as we are aware in all these cases substantive relief in addition to the setting aside of the decree was sought. In *Abdul Mazumdar* v. *Mahomed Gazi* (1) it was held that a suit will lie to set aside a decree and the sale held in execution of that decree, when both the sale and the decree are impeached on the ground of fraud. The suit in that case was not merely to have the decree set aside, but was a suit for a declaration of title to and for confirmation of the possession of the plaintiffs of certain immovable property after setting aside an *ex parte* decree and the sale in execution thereof on the ground that the decree and the execution

(1) (1894) I. L. R., 21 Calc., 605.

sale were fraudulent. To the same effect was the decision in *Pran Nath Roy* v. *Mahesh Chandra Moitra* (1). In that case also the plaintiffs sought to recover possession of property which was sold in execution of a decree which had been obtained by fraud. In the case of *Kedar Nath Mukerjee* v. *Prosonna Kumar Chatterjee* (2) a judgment-debtor, against whom a decree was alleged to have been fraudulently obtained in the Court of Small Causes at Krishnagar, in execution of which certain property was brought to sale and was purchased by the defendant, instituted a suit to set aside the decree and the sale in execution whereof the property was sold in the Munsif's Court at Katwa, that being the Court in which the execution proceedings including the sale took place and within whose jurisdiction the property in suit was situate. It was held by Ghose and Stevens, JJ., that the suit was maintainable. In the course of their judgment the learned Judges, however, say:—"It may not be competent to the Munsif of Katwa to set aside the decree passed by the Small Cause Court of Krishnagar as fraudulent, but we are disposed to think that it is competent to him to investigate the question as to the character and validity of the decree for the purpose of giving relief to the plaintiff such as he may be entitled to in respect to the land which he has lost by reason of the sale held in execution of that decree." The case of *Banke Behari Lal* v. *Pokhe Ram*, (3) is also in point. In that case the plaintiff alleged that he was the adopted son of one Balmakund and that the defendants who were the trustees of the will of Balmakund had entered into a collusive suit which they had fraudulently compromised with the result that one defendant had obtained from the Court a decree for a considerable sum payable out of the property left by Balmakund which property the plaintiff claimed as his own. The decree-holder had the decree which was obtained in Calcutta, transferred for execution to Cawnpore, and was seeking to execute it against the estate of Balmakund within the jurisdiction of the Subordinate Judge of Cawnpore. The plaintiff then filed a suit in the Court of the Subordinate Judge of Cawnpore, and prayed in effect that the compromise and the decree founded thereon

(1) (1897) I. L. R., 24 Calc., 546. (2) (1901) 5 C. W. N., 559.
(3) (1902) I. L. R., 25 All., 48

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might be declared to be null and void as against him and that an injunction might be issued restraining the execution of the decree. It was held by our brothers Banerji and Aikman that, although the decree was passed in Calcutta, yet inasmuch as the property affected by the decree was in Cawnpore, and execution was being taken out there, a material portion of the plaintiff's cause of action arose in Cawnpore, and the Subordinate Judge of that place had jurisdiction to try the suit. This decision goes further than any of which we are aware, but it does not go so far as the decision against which the appeal before us has been preferred. Banerji, J., in delivering the judgment of the Court expressed his concurrence in the view of the law laid down in the case of *Nistarini Dassi* v. *Nundo Lall Bose* (1), and remarks "if the allegation of fraud and collusion made by the plaintiff, be established, the Court below would be competent, if it otherwise had jurisdiction over the suit, to declare that the compromise and the decree in question are void and ineffectual as against the plaintiff. The plaintiff does not ask the Court to set aside the decree of the Calcutta High Court and therefore the ruling in *Bibee Soloman* v. *Abdool Aziz* (2), on which the learned counsel for the respondent relies, has no application." In the case before us the plaintiff asked the Court to set aside the decree of the Calcutta Court and that alone. No other relief was payed for. The question before us is very fully discussed in the case of *Nistarini Dassi* v. *Nundo Lall Bose*. The authorities seem to us to establish that, save under special circumstances such as those which are to be found in the cases to which we have referred, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained. We think that the language of the learned Judge of this Court is altogether too wide. Startling consequences would be possible if it were the law that a Court in these Provinces could set aside on the ground of fraud practised in another province a decree obtained in such province. This would be virtually to subject the decree of the Civil Courts to revision and reversal by superior, or even equal or inferior Courts to which

(1) (1899) I. L. R., 26 Calc., 903. (2) (1979) 4 C. L. R., 366.

they are not subordinate. We, therefore, allow the appeal, set aside the decree of the learned Judge of this Court and also the decrees of the lower courts and dismiss the plaintiff's suit with costs in all Courts

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Appeal decreed.

APPELLATE CIVIL.

1907 *February* 13.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

KADHU SINGH (PLAINTIFF) v. BALJIT SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 506—Arbitration—Application for reference signed by pleader holding a defective vakalat-namah.

An application under section 506 of the Code of Civil Procedure for a reference to arbitration was made by the parties to a pending suit. This application was signed on behalf of the defendants by some of the defendants personally, and on behalf of the others by a pleader. It appeared, however, that the pleader's vakalat-namah had not been signed by one of the defendants on whose behalf the pleader had signed. *Held* that, in the absence of any circumstance to estop the defendant who had not signed from objecting to the reference, the reference to arbitration and all subsequent proceedings founded thereupon were invalid. *Ram Mal* v. *Sadiq Ali* (1) distinguished.

THE suit out of which this appeal arose was brought by the plaintiff to enforce a mortgage executed by one Kunjal Singh. The mortgagor, his son's grandsons and great-grandsons, were made parties to the suit, and the plaintiff sought to obtain a decree against the joint ancestral property of the defendants. A joint written statement was filed on behalf of all the defendants by a pleader named Munna Lal. Subsequently the defendants applied for a reference to arbitration, and the suit was referred to arbitration and award was made. In these proceedings the submission to arbitration was signed by three of the defendants, Baljit Singh, Punni Singh and Tara Singh, and on behalf of the rest by Munna Lal. Objections were taken to the award by two of the defendants, but these were overruled and a decree passed upon the award. Against this decree one of the defendants, Daryao Singh, appealed upon the ground that he had never executed the vakalat-namah in favour of Munna Lal in virtue of which

*First Appeal No. 61 of 1906, from an order of E. O. E. Leggatt, Esq., District Judge of Bareilly, dated the 19th of April 1906.

(1) (1898) I. L. R., 24 All., 229

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Munna Lal signed the submission to arbitration; consequently there was no valid submission, and the award and decree based thereon were bad in law. The Court (District Judge of Bareilly) allowed this appeal and set aside the award and the decree based thereon. The plaintiff appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, Munshi *Jang Bahadur Lal* and Babu *Surendra Nath Sen*, for the appellant.

Munshi *Gobind Prasad* and Babu *Sital Prasad Ghosh*, for the respondents.

KNOX and RICHARDS, JJ.—This was a suit to enforce a mortgage. The mortgage was made by one Kunjal Singh. He, his sons, grandsons and great-grandsons were all made parties to the original suit, and the plaintiff sought to obtain a decree against the joint ancestral property of the defendants. A joint written statement was filed on behalf of all the defendants by a pleader named Munna Lal. The suit was subsequently referred to arbitration, and an award, which we have no reason to think to be an unfair or unreasonable award, was made. It, however, appears that the original vakalat-namah given to Munna Lal was not signed by one of the defendants, Daryao Singh. The submission to arbitration was signed by three of the defendants, namely, Baljit Singh, Punni Singh and Tara Singh. Munna Lal purported to sign on behalf of the other defendants. An objection was taken to the award by two of the defendants, namely, Lochan Singh, and Hem Singh. The objections appear to have been frivolous. The objections were overruled by the Subordinate Judge, and a decree was passed on the award. Daryao Singh appealed, and the District Judge allowed his appeal and set aside the decree, on the ground that there was no "reference by the parties to the suit on the application of the parties in person or by a pleader specially authorized in writing in that behalf." It is admitted that Daryao Singh never executed the original vakalat-namah or the reference to arbitration and, accordingly, it is quite clear that unless Daryao Singh is estopped from denying the validity of the reference, there was no reference by him within the meaning of section 506 of the Code of Civil Procedure. We find no facts or circumstances which would enable us to say that the "declaration, act or omission" of Daryao Singh

estopped him from setting up the case he made in his appeal to the District Judge. The law provides the mode in which these references of suits to arbitration are to be carried out and it was the duty of the appellant to see that the submission to arbitration was in due form and binding on all the defendants. It is said that if Daryao Singh did not authorize Munna Lal to file the written statement, he admitted the plaintiff's claim, and, accordingly, that there was no "difference" between him and the plaintiff, and that, therefore, he was not a necessary party to arbitration. In support of this the case of *Pitam Mal* v. *Sadiq Ali* (1) has been cited. It was there contended that it was necessary for the validity of an award that all parties to the suit should be parties to the award. The Courts held that it was only necessary to have the parties to the suit parties to the award between whom the differences submitted to arbitration existed. The present case is clearly distinguishable. Here the plaintiff seeks to bind Daryao Singh by the award and by the decree which incorporates the award. He seeks to bind Daryao Singh as if he were expressly a party to the award and the decree founded thereon. A second point was urged here by the appellant, namely, that the decree at the most should be set aside only as against Daryao Singh. We do not agree with this contention. The ground of the decree was the award, which award was founded on the reference, and unless the reference was valid under the provisions of section 506 of the Code of Civil Procedure, the award and the decree were invalid, and, in our opinion, proceeded on a ground common to all the defendants.

The only remaining question to be dealt with is the question of costs. We find that all the defendants were members of a joint Hindu family. They were represented by a single pleader, Munna Lal, and Daryao Singh's father, Tara Singh, signed the vakalat-namah and also the reference. We strongly suspect that Daryao Singh was fully aware of the proceedings. In fact it is hard to conceive how he can be ignorant of them. There is a great deal which induces us to think that this is the last attempt to get rid of what was really an honest award by Mr. Banerji.

(1) (1898) I. L. R., 24 All., 229.

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RADHU SINGH v. BALJIT SINGH.

We dismiss the appeal and direct that the costs of all the parties represented here shall abide the decision of the case.

Appeal dismissed.

1907
March 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

SHAM LAL AND ANOTHER (DEFENDANTS) v MISRI KUNWAR (PLAINTIFF) AND RAM SARUP (DEFENDANT).*

Civil Procedure Code, sections 521, 522—*Arbitration—Award—Decree on judgment in accordance with award—Appeal*

During the pendency of a suit in the Court of a Subordinate Judge the matters in dispute between the parties were referred to arbitration. In due course a document purporting to be the arbitrator's award was received by the Court through the post. Objections were filed by one of the defendants to the suit: but these objections were, after hearing, disallowed by the Court, which proceeded to pass a decree in accordance with the award

Held that an appeal would lie from such a decree upon the ground that the so-called award was never delivered by the arbitrator and was in fact and in law no award at all.

IN the suit out of which this appeal arose the parties agreed to refer the matters in dispute between them to the arbitration of one Moti Ram. An order of reference was made, and in course of time what purported to be the award of the arbitrator was received by the Court (Additional Subordinate Judge of Aligarh). Sham Lal, one of the defendants, filed objections to the award, but his objections were overruled, and the Court passed a decree in accordance with the award. The defendants appealed to the High Court, reiterating the objections which they had taken in the Court below, and which were to the effect that the document purporting to be an award, which had reached the Court through the post, was in fact and in law not the award of the arbitrator appointed by the Court at all; but, if anything, one of two conflicting awards which the arbitrator had prepared with the view of inducing the parties to compromise the case; and that it had not been sent to the court by the arbitrator or any one else on his instructions.

Mr. *B. E. O'Conor* and the Hon'ble Pandit *Sundar Lal*, for the appellants.

* First Appeal No. 28 of 1905, from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 22nd of February 1905.

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SHAM LAL v. MISRI KUNWAR.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal and the connected appeal No. 99 of 1905, arise out of suits instituted by the plaintiff Musammat Misri Kunwar for a determination of her rights as to certain property. In the plaint she claimed a declaration that she was in possession of the property in dispute under a partition, but that if the Court found that she was out of possession then that possession might be awarded to her. In the progress of litigation the parties agreed to refer their disputes to the arbitration of one Moti Ram, who is connected with the parties. On or about the 6th of January 1905, the Court received what purports to be an award. Notification of the award was given to the parties, whereupon the defendant Sham Lal filed an objection to the alleged award, stating in his objection that the arbitrator did not investigate the subject-matter of the arbitration; that he did not record any award, but repeatedly asked him (the objector) to have the matter in dispute compromised, and refused to decide the case as arbitrator. He prayed that the award might be set aside. The Court, however, did not entertain the objection, but passed a decree upon the award, holding that it was a valid and binding award. The appellants now appeal from this decree, and allege that there was in fact no legal award made by the arbitrator, and that the arbitrator was guilty of such misconduct as justified them in applying to the Court to have the award set aside.

The arbitrator was examined, and he bears out fully the allegations of the appellants. It appears from his deposition that he was desirous that the parties should amicably settle their differences, and in order to compel them to do so he prepared two awards, one favourable to the plaintiff and the other favourable to the defendants, and that having these awards ready he used them to coerce the parties into a compromise. In his evidence he says :—"I did not make any award in the presence of the parties on the 31st of December 1904. The award now before the Court was in my bag; but I did not intend to make it. It was only to threaten the parties that I kept in my bag this award and also another of an entirely contrary nature." Then

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SHAM LAL v. MISRI KUNWAR.

he says that these two awards were in the handwriting of his grandson Janki. The evidence given by Moti Ram is very meagre and it is noticeable that it does not appear from it how the award came to be filed in Court. Mr. *O'Conor* on behalf of the appellants suggests that the document was abstracted from Moti Ram's bag, but there is no evidence to support this suggestion. It is particularly unfortunate that Moti Ram was not subjected to more severe cross-examination, or even to a more lengthy examination-in-chief, and that the Court did not put to him some pertinent questions in regard to the remarkable evidence which he gave. Be this as it may, however, the fact remains that Moti Ram himself repudiates the idea that the award upon which the decree has been based, was a genuine award made or published by him. He shows by his own evidence that it was not a genuine award and was not intended to be used as such, but was simply drafted with a view to compel the parties to come to terms. From his own evidence it is apparent that he has been guilty of grave misconduct, and in view of his misconduct and of the evidence it is clear that the Court ought not to have passed a decree as it did upon this so-called award. We, therefore, allow the appeal, set aside the decree of the Court below and direct the learned Subordinate Judge to reinstate the suit in the file of pending suits and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

1907
March 9

Before Mr Justice Richards.

RAMJIAWAN RAM (APPLICANT) *v.* KALI CHARAN SINGH AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, section 506—Arbitration—Authority of pleader to agree to reference

A vakalat-namah in general terms is wholly insufficient to enable a pleader to apply for an order of reference to arbitration on behalf of his client under section 506 of the Code of Civil Procedure. Where, however, a reference was made on such authority and an award followed and a decree based on such award without any objection taken to the authority of the pleader to apply for a reference, the High Court refused to set aside such decree in revision.

THIS was an application in revision by which one of the plaintiffs in a suit in a Munsif's Court sought to have set aside a decree based upon award made in pursuance of a reference under section 506 of the Code of Civil Procedure. The objection, which had not been taken in the memorandum of appeal in the lower appellate Court, but only orally, was to the effect that the pleader who had signed the application for an order of reference in the Munsif's Court held only a vakalat-namah in general terms and was not authorized to bind his client by a submission. Other objections had been taken to the award in the Munsif's Court, but these had been dismissed. The decree of the Munsif was likewise affirmed on appeal by the District Judge. One of the plaintiffs then applied to the High Court in revision raising again the question of the competence of his pleader to sign the submission to arbitration in his behalf.

Babu *Surendra Nath Sen*, for the applicant.

Babu *Satya Chandra Mukerji* (for whom Lala *Kedar Nath*), for the opposite parties.

RICHARDS, J.—This is an application for revision. The sole ground is that the decree is founded upon the award of arbitrators, and the applicant says that the application for submission to arbitration was not signed by him and that his pleader was not especially authorized in writing to make the application for reference. The facts appear to be as follows:—The applicant and his son, one Mathura Ram, were plaintiffs in a suit in the Munsif's Court. They

* Civil Revision No 49 of 1906

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appeared by one pleader. The parties agreed to refer the questions in dispute to arbitration The application to the Court to order the reference under section 506 of the Code of Civil Procedure was signed by the son, Mathura Ram, in person, and the pleader signed on behalf of the present applicant. The vakalatnamah was in general terms. In my judgment it was not sufficient to authorize the pleader to make a valid application for reference under section 506. The order for reference was, however, made. The arbitrators entered on their arbitration and duly made their award. Objections were taken to the award on behalf of the plaintiffs which were overruled, but no objection was taken that the order for reference had been made without the pleader for Ram Jiawan being especially authorized in writing by Ram Jiawan. The Court of first instance held in favour of the award after due consideration of all points raised. The plaintiffs appealed. The ground on which this present application is based is absent from the grounds of appeal, and the question now argued and raised was only orally raised for the first time before the Subordinate Judge. It has been found, and, I have not the smallest doubt, rightly found, that applicant knew all about the submission to arbitration and the award. He acquiesced in the submission to arbitration, and it was not until the defendants had gone to arbitration and the award was made that he attempted to raise the present question as to its validity. It is quite too late to do so now, and I have no hesitation whatever in refusing this application for revision. I wish, however, to say that in my opinion all Courts ought in all cases to be most careful that the provisions of section 506 of the Code of Civil Procedure are strictly complied with. It is the duty of the Court itself to see that the parties have signed the application for an order of reference themselves in person or that when the application is signed on their behalf by a pleader that pleader is expressly authorized in writing. A vakalat-namah in general terms is wholly insufficient.

I reject the application with costs.

APPELLATE CIVIL.

1907
March 14

Before Sir John Stanley, Knight, Chief Justice, and Mr Justice Sir William Burkitt.

MAHARAJA OF BENARES (PLAINTIFF) *v.* NAND RAM AND ANOTHER (DEFENDANTS) *

Act No XV of 1877 (Indian Limitation Act) Schedule II, Article 75—Bond—Instalments—Waiver of right to recover whole amount on non-payment of instalment—Limitation

Where money secured by a bond is payable by instalments, with a condition that the whole amount secured will become due upon non-payment of any instalment, the creditor is not bound to enforce this condition, but he may accept payment of instalments after due date—thereby, impliedly waiving his right to sue for the whole amount due—and may sue upon a subsequent default in payment of any future instalment. *Basant Lal* v *Gopal Parshad* (1) distinguished

THE plaintiff in this case gave a lease of certain property to the defendants for a term of fourteen years, from 1305 to 1319 Fasli. At the date of the lease there were certain arrears of rent due by the tenants of the property leased. These arrears the lessees agreed to pay, and they executed a bond for the same, payable by instalments. The instalments for 1305 and 1306 Fasli were paid, although not upon the due dates. The instalments due for 1307 to 1309 Fasli not having been paid, the plaintiff sued to recover them. The defendants pleaded that as the first instalment had not been paid upon due date, according to the terms of the bond, the whole amount secured thereby became due and payable at once, and the suit was therefore barred by limitation. The Court of first instance (Munsif of Mirzapur) decreed the plaintiff's claim, but upon appeal the lower appellate Court (District Judge) upheld the contention that the suit was time-barred and allowing the appeal dismissed the suit. The plaintiff thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* (for whom Dr. *Tej Bahadur Sapru*), for the appellant.

Mr. *M. L. Agarwala*, for the respondents.

* Second Appeal No. 604 of 1906, from a decree of Syed Muhammad Ali, District Judge of Mirzapur, dated the 23rd of May 1906, reversing a decree of Behari Lal Merh, Esq., Munsif of Mirzapur, dated the 21st of January 1906.

(1) Weekly Notes, 1906, p 193.

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MAHARAJA OF BENARES v. NAND RAM.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit brought by the plaintiff for recovery of arrears of instalments payable under a bond given to him by the defendants. The plaintiff gave a lease to the defendants of certain property for a term of 14 years, namely, from 1305 to 1319 Fasli. At the date of the deed there were arrears of rent due by the tenants, and the defendants agreed to pay the amount of these arrears, and executed a bond for the same, payable in instalments. The instalments payable for the years 1305 and 1306 were paid, but not upon the dates fixed for payment, but thereafter. The suit which has given rise to this appeal was then instituted by the plaintiff for the instalments for the years 1307—1309 Fasli. His claim was met by the defence that the first instalment was not paid when it fell due, namely, on the 4th of June 1898, and that consequently under the provisions of the bond all the instalments became forthwith due and payable, and this being so the claim is barred by limitation. The Court of first instance decreed the plaintiff's claim, but upon appeal the learned District Judge upheld the contention that the suit was barred and dismissed the plaintiff's claim. An appeal from this decree is now before us.

A number of authorities have been quoted, including the case of *Basant Lal* v. *Gopal Parshad* (1), in which the question as to the rights of a creditor in respect of bonds payable by instalments was considered. It appears to us that a case of this kind must be decided in view of the language of the particular bond which is the subject of litigation. In the bond sued on there is a provision enabling the creditor on failure on the part of the defendants to pay any instalments on the appointed date, to sue for and recover the entire amount of instalments then remaining unpaid. This option is given to him in very clear terms. The words are '*har guna ikhtiar hoga*,' that is, it will be in his power to sue for the entire amount. When the first instalment became due on the 4th of June 1898, the plaintiff did not take advantage of the provision in the bond inserted for his benefit and sue for the entire debt, but accepted payment of the instalment for that year, as also the instalment payable for the succeeding year in various sums and at various dates. His forbearance to exercise the power given

(1) Weekly Notes, 1906, p. 193.

to him in the bond, is now set up as a defence to his suit for the recovery of the balance still remaining unpaid. The article of the Limitation Act which is applicable to the case is clearly article 75. That article prescribes a period of three years for the institution of a suit upon a bond payable by instalments from the time when the first default is made; but there is this important qualification, namely, unless where the payee or obligee waives the benefit of the provision; in that case limitation runs from the time when a fresh default is made in respect of which there is no such waiver.

The question then is whether or not the plaintiff in this case waived the benefit of the provision to which we have referred. There was no express waiver, but waiver may be implied, and it is implied when a person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is so entitled; for instance, a landlord by acceptance of rent after a forfeiture of the tenancy is deemed to have waived his right to insist on a forfeiture. Here, it appears to us, the plaintiff impliedly waived his right to insist upon payment in a bulk sum of all the instalments remaining due when the first instalment was not paid on the 4th of June 1898, and he accepted payment of the instalments for two years in various sums at various dates. It would be very unfortunate if it were otherwise. It would be to punish a creditor for forbearance shown to his debtor, and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim. We cannot in this case take this stringent view of the law, which we are asked to do by Mr. *Agarwala*. We think that article 75 provides for this case and that under that article limitation starts from the time when the instalment for 1900 became payable. The suit was not therefore barred by limitation. We allow the appeal, set aside the decree of the lower appellate Court, and, as that Court has decided this case upon a preliminary question, namely, that the suit is barred by limitation, and we have reversed its decision on that question, and other issues have been left undetermined, we remand the appeal under the provisions of section 562 of the Code of Civil Procedure with directions that it be reinstated in the file of pending appeals and be decided on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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March 23.

APPELLATE CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

EMPEROR v. KEHRI AND OTHERS *

Act No. I of 1872 (Indian Evidence Act), section 30—Evidence—Confession—Retracted confession—Use of retracted confession as against person making it and as against co-accused.

A retracted confession may be taken into consideration, that is, used as evidence, not only as against the person making it, but as against persons tried jointly with the confessing accused for the same offence

As regards the person making it a retracted confession may, even without any corroborative evidence, form the basis of a conviction

As regards other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction; and *semble* that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful.

Queen-Empress v. *Mathu Lal* (1) followed. *Empress* v. *Ashootosh Chuckerbutty* (2) discussed. *Queen* v. *Mohesh Biswas* (3) referred to.

THE facts of this case were as follows :—

On the 14th of April 1906, the dead bodies of two men were found near the railway line not far from a village called Ahan in the district of Aligarh. These were subsequently discovered to be the corpses of one Gafur Bakhsh, a printer of Agra, and of Muhammad Ayub, his manager. On the 10th of June 1906 one Kehri was arrested on a charge of being concerned in the murder of these two men, and on the 12th of June 1906, Kehri made a long and detailed confession before a Deputy Magistrate, implicating himself in the murder, and stating that the instigators thereof were two rival printers of Agra named Bansidhar and Kanhaia Lal, between whom and Ghafur Bakhsh considerable enmity seems to have subsisted. Kehri also stated that two other men, Kallan and Chandar, had participated in the actual murder, the murdered men having been beguiled to the place where they met their death by a false story originated by Bansidhar and Kanhaia Lal that a man named Tota Ram, living at Pora, near where the bodies were found, had a press for sale. Kehri's confession was, however, retracted on the 25th of July 1906, and he alleged

* Criminal Appeal No. 1 of 1907.

(1) (1897) I. L. R., 20 All., 163. (2) (1878) I. L. R., 4 Calc., 483.
(3) (1873) 19 W. R., Cr. R., 16.

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that he had made it under the influence of torture applied by the police. Kehri, Bansidhar and Kanhaia Lal were charged with the murder of Ghafur Bakhsh and Muhammad Ayub, were convicted—chiefly on the confession made by Kehri—by the Sessions Judge of Aligarh, and sentenced to death. From these convictions and sentences all three convicts appealed.

Babu *Satya Chandra Mukerji*, for the appellant Kehri.

Lala *Kedar Nath*, for the appellants Bansidhar and Kanhaia Lal.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

KNOX, J.—This case has been submitted by the Sessions Court of Aligarh for confirmation of sentence of death passed upon Kehri, Aheria, and two brothers, Bansidhar and Kanhaia Lal. We have also to consider appeals filed by all three convicts and all three are represented in Court by the same learned vakils. The learned Judge has considered the case in a very long and elaborate judgment, and I do not propose to go into the facts at any great length except as they bear upon the real issue which was raised in appeal before us.

The fact that Ghafur Bakhsh, a printer and publisher at Agra, and his manager, Muhammad Ayub, were murdered on the 13th of April 1906, is not denied and is abundantly proved. The questions which I have really to consider are, first whether Kehri was or was not one of the persons who murdered Ghafur Bakhsh and Muhammad Ayub; secondly, whether Bansidhar and Kanhaia Lal, either or both of them, instigated Kehri to commit the murder above-mentioned. I think it well to state at once that the case before us is one in which, if we were to exclude from consideration the statement made by the convict Kehri and recorded by a Deputy Magistrate on the 12th of June 1906, no conviction could follow. The statement is corroborated by other evidence, but most certainly the facts disclosed by that evidence are not of themselves sufficient to support a conviction. I therefore propose to state why, after most prolonged and careful consideration, I am satisfied that that statement is a true and reliable statement. If that statement is true, Kehri was one of the murderers, and Kanhaia Lal and Bansidhar instigated the murder. The statement made was, however, retracted on the 25th

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July 1906. In the Court of Session and also before us, Kehri says that he was forced to make the statement under severe police pressure, and there is evidence which shows that he was prepared to withdraw, if he did not actually withdraw, it as far back as the 16th and 17th of June. Mr. *Satya Chandra*, who confined himself to the case of Kehri, contended that as regards Kehri the confession was inadmissible, first, because it was made by Kehri while in police custody, and, secondly, because it was made by Kehri under distinct inducement offered him by the police to make it. Mr. *Kedar Nath*, who confined his arguments to the cases of Bansidhar and Kanhaia Lal, contended equally strongly that as against his clients the statement having been retracted could not be considered at all, and even if it could be considered, it could not be proof of any facts against his clients and could only at the utmost be used to supplement evidence which in itself and by itself was sufficient to convict them of the offence charged. There being no such evidence on the record, to convict Bansidhar and Kanhaia Lal upon the so-called confession of Kehri would be illegal.

I am fully conscious that the fact that the confession was retracted and that independently of it there is no evidence which would be sufficient to convict the accused of the several offences with which they have been charged, makes it necessary to examine the confession most carefully and to consider with equal care the circumstances under which it was made.

I will consider first the two objections put forward on behalf of Kehri.

The murders were committed on the 13th or 14th April 1906. Kehri was not arrested until the 10th of June 1906, and the confession was placed on record just two days after his arrest. I find that the arrest took place in Agra. The officer who arrested him was a police officer from the District of Aligarh. Upon his arrest he was not taken to the Agra police station, though that station was within a few paces of the place of arrest; the officer who arrested him, produced him at once before a Magistrate of Agra, asked for a remand and stated that he wished to take the prisoner to appear before the Magistrate of Aligarh. On his way to Aligarh the train would pass Hathras, and the prisoner was

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undoubtedly taken to Hathras police station on the 11th and not produced in the Aligarh Magistrate's Court before the 12th.

Mr. *Satya Chandra* contended that the above procedure on the part of the arresting officer (especially his acting without consulting the police at Agra and his breaking journey at Hathras) was irregular, and being irregular, open to grave suspicion. He also points to a passage in the evidence given by Abdul Ghafur Khan, the arresting officer, in which he says that when he arrested Kehri and got the remand he wanted Kehri to make a statement. The evidence then continues as follows:—"He said that as the Inspector was investigating he would make his statement to him. On the way to Hathras he asked me to send for his relatives. I did so. I reached Hathras with accused on 11th June, at 2 P.M. The Inspector had not then arrived. He came during the night of the 11th at 8 or 9 P.M. and I put accused before him next day. Neither I nor any of my subordinates ill-treated him." He maintains that the proper inference to be drawn from this is that the police were between the 10th and the 12th using inducements to make Kehri confess and that the statement made by Kehri on the 12th was made under this inducement. The probability is, he adds, that the inducement was a promise of pardon.

I have considered these arguments very carefully. I have also taken into consideration the fact that the Magistrate who recorded the statement appears to have recorded it after satisfying himself that Kehri was not making the statement under any inducement, threat or promise, and also the further fact that the prisoner had never up to the date of this appeal put forward the plea that he made the statement under the influence of any inducement. Before the committing Magistrate he denied having made any statement; and he added details of vile torture to which both there and in the Court of Session he says he was subjected by the police.

I have no doubt that the police did send for his relatives and that he was overpersuaded by his relatives, or by the police, or by both, into making the statement which he did make on the 12th of June, but I am satisfied that he was not duped into it by a promise of pardon, and that what he stated about torture is absolutely

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untrue. I consider the record as made by the Deputy Magistrate and the evidence of Major Woodwright as conclusive on this point. The probabilities too are against it. This is not the first time that Kehri has been under police arrest. He belongs to a class who are not ignorant of police methods, and I feel sure that if any inducement of pardon had been held out to Kehri he would, on finding that the police were playing him false, have alluded to it on one of the several occasions on which he subsequently did make statements.

I do not consider the confession open to exception on the ground that it was made under inducement brought about by torture or by any other irregularity. I fail to find this or any other misconduct on the part of the police.

Coming to the statement itself (and I have examined it carefully both with and without the aid of the vakils who appear for the convicts) I do not find in it traces of its being a manufactured story. It is a very long and very clear statement. It is consistent throughout and Kehri most clearly takes upon himself the responsibility of the murder of both the deceased. It is a statement which I consider so probable that I have no alternative but to act upon it as being the truth, at any rate in what concerns Kehri; and find myself asking the question—Is there any provision of law which renders it inadmissible so far as Kehri is concerned? It is true that it was retracted, but the very way in which it was retracted leads to the conclusion that the retracted statements are the improbable and the original statement the probable statement.

Giving full weight to the danger of acting upon retracted confessions, as I can find nothing in the law which says that they cannot be used against the person who makes them, I find myself compelled to accept the statement made by Kehri as a true statement which convicts him of the offence of which he is charged. Both the character of the confession and circumstances under which it was taken indicate to my mind that the confession was a voluntary confession when it was made and that when Kehri says he and Kallan went and killed Ghafur and Muhammad Ayub, he was telling the truth. A prisoner may be convicted on his own confession without any corroborating

evidence, and this Court had held that, even when a confession has been retracted, if a Judge believes that that confession contains a true account of that prisoner's connection with the crime, he is bound to act, so far as that prisoner is concerned, on the confession which he believes to be true —— *Queen-Empress* v. *Maiku Lal* (1). I do not therefore propose to consider further in his case the corroborative evidence beyond saying that there is such evidence. I believe the confession, and this in itself makes it necessary to dismiss the appeal of Kehri.

I next proceed to consider the case of the appellants Kanhaia Lal and Bansidhar.

Does the law anywhere forbid a Court in this country from considering at all against persons tried jointly for the same offence a confession made by one of such persons affecting himself and the persons who were being tried jointly, when such confession has been subsequently withdrawn? It appears to me that this is a limitation which does not exist in and would have to be introduced into the words used in section 30 of the Indian Evidence Act, 1872, and that to do so would be not to follow the law as it stands but to legislate. By making the confession, especially where it is made under the protection of a Court, the person who makes the confession has exposed himself to the pains and penalties prescribed for the offence, and we have this guarantee, *quantum valeat*, for the truth of the statement. It may be a weak guarantee, but it is some guarantee, and I cannot agree that the retraction of the confession, especially if that retraction bears on the face of it *indicia* of being false, can still further weaken the value which attaches to it when it has once been made. If something said by the prisoner afterwards puts a Court upon inquiry and raises the suspicion that it is inadmissible as a confession that suspicion may prove to be well founded or may engender a doubt and make it safer, to hold that it is inadmissible, and the fact that the prisoner made it together with all contained in it vanishes, so to speak, into "thin air" and there is no longer any basis, so far as the confession is concerned, for inference of any kind. But if that something so said afterwards by the prisoner turns out to be false, we are thrown back

(1) (1897) I. L. R., 20 All., 133

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upon the original conclusion that until the contrary is shown the confession is *prima facie* voluntary and is admissible. Section 30 adds that under the circumstances set out in that section it may be taken into consideration against others, and I agree with what Garth, C.J., laid down in *Empress* v. *Ashootosh Chuckerbutty* (1) when he says:—"I do not see in what other way it can be taken into consideration than as evidence. There is no provision in the section by which the confession is to be receivable against one prisoner in one way, and against the other prisoner in another way. But although the section does, in my opinion, make the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence and the question whether taken by itself, it is sufficient in point of law to justify a conviction is a question for the Judge who tries the case."

He goes on to say:—"A confession by prisoner *A* which involves the guilt of prisoner *B* is of itself, unsupported by other testimony, evidence of the weakest possible kind against *B*. It is simply a statement of a third person not made upon oath or affirmation, and I am of opinion that no Court ought to convict prisoner *B* upon such evidence."

I accept the first part of this statement as a sound exposition of the law upon the point and one with which I am prepared to agree; but with regard to the second portion, and with the utmost respect to the eminent Judge who delivered it I can only accept it with the reservation that it does not take into sufficient account the sanction which such a statement has from, first, the fact that the confessing prisoner has brought himself within the penalty of the law, and from the further fact that the statement is made in the presence and hearing of the co-accused, and it is therefore too much to say that it is evidence of the weakest possible kind. I go on to consider whether in the confession of Kehri there are any reasons evident upon the face of it which would disentitle that confession from being considered at all. Such a consideration would be the existence of malice on the part of Kehri against either Kanhaia Lal or Bansidhar or against both, the existence of any ground for the inference that

(1) (1878) I. L. R., 4 Calc., 483, at p. 490.

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the police who conducted the investigation were wrongly interested in establishing a conviction against these men or either of them, or any indication that Kehri was trying to save himself at their expense. I find no trace of any ground for suspicion of this nature. Kehri, if actuated by any motive, may reasonably be supposed to be actuated by motives friendly to his masters. There is not a vestige of any evil motive on the part of the police who conducted the investigation, and Kehri in his confession does not anywhere appear to attempt to save himself at their expense. He does not attribute to them any conduct which is on the face of it absurd or improbable.

Is the confession supported by other independent unimpeached testimony in any particular point or points which affect Bansidhar and Kanhaia Lal—*Queen* v. *Mohesh Biswas* (1)? I find that as regards Kanhaia Lal it is corroborated by such testimony in regard to motive on his part, in regard to the meeting between Bansidhar, Kanhaia Lal, Kallan, Kheri and Bhopal (*vide* testimony of Faiaz Husain) on the 12th of April. There is also the fact that Kanhaia Lal did go to the railway station on the 12th and on the 13th of April. I have examined all the evidence bearing on this by, and in the light of, the criticism applied to it by Mr. *Kedar Nath*, and I find no difficulty in accepting it. It is, I consider, both independent and unimpeachable. There is the fact that he absconded. In the case of Bansidhar this evidence is not quite so strong and we have not the visit to the railway station. There is the possibility that Kehri may have got into the habit of viewing the two partners as together and of the same mind in all transactions and have thus been led to supposing that Bansidhar must have taken part in an affair of such magnitude affecting the business. This too may have affected the evidence of the other witnesses, notably that of Faiaz Husain. It is at best a weak doubt, but weak or strong I am bound to give him the benefit of it.

I would accept the appeal of Bansidhar, set aside the conviction, find him not guilty of the offence with which he is charged and direct his immediate release.

Considering then both the statement of Kehri and the independent evidence by which it is corroborated, I consider it

(1) (1872) 19 W. R., Cr. R., 16

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proved that Kanhaia Lal did abet the murder of Ghafur Bakhsh and of Muhammad Ayub on the 13th of April 1906.

The murder was a deliberate and carefully planned murder, in which there are no extenuating circumstances, and there can be only one sentence.

I would dismiss the appeals of Kehri and Kanhaia Lal, confirm the convictions and sentences and direct that the latter be carried out according to law.

RICHARDS, J.—Bansidhar and Kanhaia Lal are brothers and carried on the business of printers, book-sellers and publishers at Agra.

It is alleged that Bansidhar and Kanhaia Lal instigated the appellant Kehri and a man named Chandan, Aherias by caste, to murder one Ghafur Bakhsh. Ghafur Bakhsh carried on the same business in Agra as the appellants Bansidhar and Kanhaia Lal. The case for the prosecution is that intense enmity sprung up between Bansidhar and Kanhaia Lal on the one side and Ghafur Bakhsh on the other. As the result of this enmity Bansidhar and Kanhaia Lal determined to get rid of Ghafur Bakhsh and conspired with Kehri and Chandan for his murder. In pursuance of this conspiracy Ghafur Bakhsh and his manager Muhammad Ayub were decoyed to a jungle near a place called Pora and there brutally murdered by Chandan, Kehri and two other persons. It is not alleged that Bansidhar or Kanhaia Lal took any part in the actual murder. Notwithstanding the very able way in which each division of the evidence has been criticised by Mr. *Kedar Nath*, I have no doubt that great bitterness due to trade rivalry did exist between Bansidhar and Kanhaia Lal and the deceased Ghafur Bakhsh. The evidence on this point has been fully dealt with by the learned Sessions Judge, and I deem it unnecessary to refer to this part of the evidence in detail.

On the 14th of April 1906, the dead bodies of two men were found near the Railway line in the vicinity of a village called Ahan. There can be no doubt whatever that the corpses were the corpses of Ghafur Bakhsh and Muhammad Ayub. It was not known whose the bodies were at the time, but they were photographed and subsequently recognised. Whoever were the

culprits, there is also no doubt that Ghafur Bakhsh and Muhammad Ayub were brutally murdered.

A false story was invented that a printing press which belonged to a man named Tota Ram was for sale, and by means of this story Ghafur Bakhsh and Muhammad Ayub were decoyed to the place where they met their death. The deceased left their homes at Agra to go to Pora to negotiate for the purchase of the printing press. This is all clearly proved. The question remains whether the guilt of all or any of the appellants is established. Kehri made his confession shortly after his arrest. He was in the employment of Bansidhar and Kanhaia Lal, and in his confession he states that his employers Bansidhar and Kanhaia Lal asked him to get a man to kill Ghafur Bakhsh; that he went to his own village, a place called Ramnagar, about six miles from the spot where the bodies were afterwards discovered, and brought from thence his uncle Chandan; that he produced Chandan before Bansidhar and Kanhaia Lal in Agra; that the false story of the printing press and sale was then concocted, and that eventually Ghafur Bakhsh and Muhammad Ayub on the 13th of April 1906 went from Agra to Pora by train and thence to the jungle where they were murdered by Chandan himself and two other persons, one named Kallan and the other Kundan. He says that subsequently in his presence Kanhaia Lal paid Chandan seven sovereigns of 15 rupees for what he had done and promised to pay him more when the whole thing was hushed up. In this confession Kehri does not say specifically who it was who asked him to get a man to kill Ghafur Bakhsh. His words are:—"Bansidhar and Kanhaia Lal told me in their press that I should bring a man to murder Ghafur." There is no doubt but that Kehri intended by his confession to implicate both Bansidhar and Kanhaia Lal, but he attributes separate and distinct action to Kanhaia Lal, who, he says, went to the Railway station on two occasions, first, on the 12th April and, secondly, on the 13th, evidently to see that the deceased actually started on their fatal journey. He also alleges that Kanhaia Lal paid Chandan his reward, as also a sum of 1 rupee and 4 rupees to Kehri and Kallan, respectively. He makes no similar allegations against Bansidhar. Apart from the confession of Kehri the direct evidence against Bansidhar and

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Kanhaia Lal is not very strong. A motive no doubt is established, and the false story which induced the deceased to leave Agra and go to Pora was just such a story as might be invented by Bansidhar and Kanhaia Lal. They knew that Ghafur Bakhsh would be a likely and willing purchaser for a printing press of the description supposed to be on sale. Bansidhar and Kanhaia Lal are much more likely to have concocted such a story than the Aherias Kehri or Chandan. Some weight, but not an undue weight, must be given to the fact that, while it is proved that enmity existed between the appellants Bansidhar and Kanhaia Lal and Ghafur, it is not suggested that either of the deceased had any other enemies in the world. The learned Government Advocate has admitted, as he was bound to admit, that unless the confession of Kehri could be considered the case for the prosecution must fail. Without the confession of Kehri the evidence against all the accused is quite insufficient. This being so, it will be well now to consider whether or not we ought to admit this confession. I feel that this consideration is the most important part of the whole case.

Kehri was arrested on the 10th June. His confession was recorded in accordance with law by a Magistrate on the 12th of June. On the 16th or 17th of the same month he placed a petition in the hands of the authorities in which he complained that he had been tortured by the police with a view to his making a statement. On the 25th July Kehri denied that he had made any statement to the Deputy Magistrate, or that he had ever been before him, and he alleged cruel illtreatment against the police. In his examination at the trial Kehri still denies that he ever made the confession before the Magistrate, and he repeats his allegations of torture against the police.

On the 13th of June Kallan was arrested and on the 14th he was placed in the same lock-up as Kehri. Kallan was a fellow servant with Kehri in Bansidhar and Kanhaia Lal's employment. I find that there is no truth in the allegations of cruelty made by Kehri. He made no complaint to the Deputy Magistrate when he made his confession on the 12th June. He made no complaint when he was admitted to jail on the evening of June 12th nor on the morning of the 13th when Major Woodwright saw him.

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He did complain on the 16th or 17th, and Major Woodwright then examined him, but found nothing that would corroborate his story. Kehri's denials that he made the confession at all to the Deputy Magistrate and that he was brought before him are obviously false. I agree with the learned Judge that Kehri's petition and retraction may probably be traced to the fact that Kallan, his fellow servant, was placed with him in the same lock-up on June 14th. It is then contended on behalf of the accused that the confession appears by the evidence to have been caused by the inducement or promises of the police. Kehri himself never alleged that it was. At the same time we would reject the confession if we found anything to show that any promise or inducement was held out to him. The vakils for the accused strongly urge us to consider on this point the evidence of Abdul Ghaffar Khan and Muhammad Ishaq Khan. The former said :—"When I arrested Kehri and got a remand in Agra on the 10th, I wanted him to make a statement. He said that as the Inspector was investigating he would make his statement to him. On the way to Hathras he asked me to send for his relatives. I did so."

Muhammad Ishaq Khan says :—"It was only on the 12th June I learned that Kehri wished to make a statement. Two of his friends were there and they said he would tell the truth if he were promised a pardon. I said I could make no promise and that if accused wished to make a statement he could. I told him that power to pardon rested with the Court."

It is urged that we ought to draw the inference from this that the Sub-Inspector of Hathras was holding out to Kehri a promise of pardon, and the confession was wrongly obtained, and therefore irrelevant under section 24 of the Evidence Act. The Government Advocate on the other hand contends that no such inference should be drawn, that the Sub-Inspector was quite justified in asking a man whom he had arrested to make a statement. He did not ask him to make an untrue statement or any particular statement, and he made no promise, and Muhammad expressly states that he told Kehri's friends that he could not promise a pardon. The Government Advocate further points out that it is not any statement made by Kehri to the

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police that is offered in evidence, but the confession made to the Deputy Magistrate after Kehri had expressly stated to the Magistrate that he made his confession of his own free will without any inducement, threat or promise.

The confession was taken in accordance with law : there is nothing whatever in the confession itself to show that Kehri was making it on account of any promise or inducement. After most careful and anxious consideration, I have come to the conclusion that there is nothing in the confession or the evidence to "make it appear" to us that the making of Kehri's confession was caused by any inducement, threat or promise. This being so, the confession is relevant and must be taken into consideration, not only as against Kehri but also as against Bansidhar and Kanhaia Lal. Later on I will deal with the question how the confession ought to be considered with regard to each of the appellants.

The case for the prosecution is that the false story about the press was told to Ghafur by Chandan, the uncle of Kehri. Kehri in his confession says that it was Chandan who told the story. The evidence of Riaz Bakhsh and Faiyaz Husain is that a stranger who gave his name as Bhopal came and told the story to Ghafur. The prosecution of course say that the man who called himself Bhopal was Chandan. There is some discrepancy between the evidence of these two witnesses and the confession of Kehri. Kehri says that Chandan came to Agra, had an interview with Ghafur, went away for three days and then returned, and after two or three days' stay in Agra took away the deceased. Both Riaz Bakhsh and Faiyaz Husain only speak of Bhopal coming on the 12th and 13th. Faiyaz Husain says he did not come before. The two different accounts are not irreconcileable because Bhopal might have come on the occasion mentioned by Kehri without either Riaz Bakhsh or Faiyaz Husain's knowing of it. The point is only important as a test of the validity of Kehri's confession, because I have not the slightest doubt, apart altogether from the confession, that a false story about the press was told to Ghafur by a strange man who called himself Bhopal. We will now consider whether the prosecution have proved the identity of Chandan. The prosecution relies first on the description given from the first of the stranger who gave the name

Bhopal. This coincides with the description of Chandan. Then comes the evidence that Kehri visited Chandan at their village Ramnagar; that they left the village together, and there is strong evidence that Chandan was seen in Agra about the 12th or 13th of April: it is also proved that when Chandan returned to Ramnagar he had money and was able to redeem ornaments and purchase grain; lastly, there is the undoubted fact that Chandan has absconded. If we believe the confession of Kehri, we can have no doubt that Chandan and the man who gave his name as Bhopal were one and the same person. Kehri in his confession never mentions the name Bhopal. This does not at all show that the men were the same, perhaps rather the contrary. If, however, the confession was false and suggested by the police, it is hard to believe that Kehri would not have said that the murderer was Bhopal or that Chandan had given the name Bhopal. There is another discrepancy in the details of the story told by Kehri and by some of the witnesses for the prosecution. Kehri says (apparently speaking of the visit to the Railway station on the 12th when the train was missed):—"When we were going to the station Ghafur met an old man . . . and Ghafur had told him to tell his son to send paper cover to the station." There is some inaccuracy about the translation. It would seem that what Kehri said was that Chandan had told Kanhaia Lal, that Ghafur had met the old man. This is much more probable, because of course Kehri was not going to the station with Chandan and Ghafur. Nevertheless the incident of meeting the old man and sending for the paper cover is represented as having taken place on the 12th and not on the 13th by him. Khwaja Bakhsh distinctly says that the incident took place on the 13th, and Ata-ullah makes it quite clear that the incident, if it happened at all, happened on the 13th.

It may be that Kehri made a mistake in his confession about the day on which this happened. It is also possible that the Deputy Magistrate in recording the long statement mistook Kehri's meaning. The discrepancy certainly exists and has not been explained. Male Khan, who is alleged to be the old man whom Ghafur met, says that Ghafur did ask him to tell his son to send his prayer book and that he did so. He does not mention

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the date. This witness was considered a very hostile witness by the prosecution. He denied the rest of the statement he made before the committing Magistrate and his prosecution for false evidence has been ordered. There is also some discrepancy as to the dates of Chandan's departure and return to his village Ramnagar. This uncertainty as to dates is almost universal in this country, so much so that one might almost suspect a case when the dates fitted in too well. The question is, do the several discrepancies I have mentioned cast such suspicion on the confession of Kehri as to make me disbelieve it, or any rate feel that I ought not to act on it?

The circumstances mentioned in the confession could not possibly have been invented by the police. Kehri was on the best of terms with his employers Bansidhar and Kanhaia Lal. There is not the smallest reason why he should have implicated them unless he was compelled to do so by the police. Mr. *Kedar Nath* has told us that he was employed by Bansidhar and Kanhaia Lal to defend Kallan, and the petition of appeal of Kehri is signed by Mr. *Kedar Nath* as well as Mr. *Satya Chandra*. The confession of Kehri in part is corroborated by direct evidence, some of it absolutely uncontroverted; it is also corroborated by certain facts and circumstances. After careful consideration I have come to the conclusion that the confession of Kehri is substantially true.

The next question is how far it can or ought to be used against the several accused. Kehri confessed himself to be one of the actual murderers of Ghafur Bakhsh and Muhammad Ayub; his confession affected the other accused who were being tried for the same offence, and section 30 of the Evidence Act enacts that such a confession under such circumstances may be taken into consideration against the person who makes the confession and his co-accused. Section 3 of the Evidence Act explains or defines the expression "proved" as follows:—"A fact is said to be proved when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists." I agree with the Full Bench decision in the case of

Empress v. *Ashootosh Chuckerbutty* that the meaning of the legislative enactment in section 30 of the Evidence Act that a confession may be taken into consideration by the Court is that the Court may treat the confession in the circumstances provided for by the section as evidence. The weight to be given to such evidence and the way in which the Court ought to scrutinize such evidence is another matter depending upon the particular circumstances of every case, but in all cases the Court should approach the consideration of such evidence with the greatest caution and with at least the caution with which the Courts have always approached the consideration of the evidence of an accomplice or informer. In the end, it seems to me, that the question which the court must ask itself is, do we believe the confession? It is urged on behalf of the appellants 2 and 3 that, if the Court were to believe all the evidence that has been given against these appellants other than the confession of Kehri, they could not be convicted, and that this being the case the confession of Kehri, cannot be used to supply the missing links in the chain of the evidence, and a passage in the judgment of Jackson, J. in the case I have just referred to is quoted in support. The learned Judge says, at p. 491 of the report:—"In my opinion the confession spoken of in section 30 of the Evidence Act to put the intention of the Legislature into a common English legal phrase, is evidence . . . but I think at the same time it is not singly sufficient to support a conviction, that it is to say, an accused person other than he who has confessed cannot lawfully be convicted upon such confession alone, nor in my opinion ought he to be convicted on the ground of such confession corroborated by circumstantial evidence unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction."

Now in the present case, if we believe the evidence, it is proved that appellants 2 and 3 had a motive for getting rid of the deceased. It is proved that the deceased was murdered by a person in their employment with the assistance of other persons. It is proved that the employé was on the best terms with his employers, and that he had any quarrel with the deceased other than the quarrel of his employers is not suggested. It is proved

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that the murder was committed for a reward given to the murderers as the wage for the act, and there is evidence that one of the murderers, not the employé, was seen with the two appellants shortly before the murder was committed. Now I think it must be admitted that all these facts, even if believed, would not warrant the conviction of the appellants 2 and 3. The missing link in the chain of the evidence is that there is, apart from the confession, no evidence to show that the appellants 2 and 3, or either of them, instigated the servant or any one else to commit the murder, nor is there any evidence to show that the reward which was paid for the murder was paid by the appellants 2 and 3 or either of them. Can the missing links be supplied by the consideration of, or, as I prefer to call it, the evidence of the confession of Kehri? This High Court has decided that an accused person can be convicted on the unsupported evidence of an approver. I can imagine many cases in which it would be impossible for the Court to disbelieve a confession, and I can see no reason why a Court could not legally convict an accused person on the unsupported evidence afforded by the confession of a co accused. At the same time I think that it is very seldom that a Court would or ought to convict on the unsupported evidence afforded by the confession of a co-accused or the evidence given by an accomplice. At the same time I cannot agree with the dictum of Jackson, J., in so far as he says in the passage quoted that such a conviction would be unlawful.

As I have already said, I believe that the confession of Kehri is substantially true. Taken as a whole, it is amply corroborated by the other evidence in the case. A motive has been proved against Bansidhar and Kanhaia Lal, and Kehri, their servant, has confessed to having taken part in the actual murder. I feel that I am bound to act on the confession. I have already pointed out that the evidence against Bansidhar is not the same as against Kanhaia Lal. I have very little doubt that he knew of and approved of the murder, but I do not think that it would be safe to convict him. I would therefore dismiss the appeals of Kehri and Kanhaia Lal and acquit Bansidhar.

BY THE COURT.—The appeal of Bansidhar is admitted. The conviction and sentence in his case are set aside. The appeals of

Kehri and Kanhaia Lal are dismissed; the conviction and sentences are confirmed; and we direct that the latter be carried out according to law.

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APPELLATE CIVIL.

1907, *April* 3.

Before Mr. Justice Banerji and Mr Justice Aikman

RAM SHANKAR LAL (DEFENDANT) v. GANESH PRASAD AND ANOTHER (PLAINTIFFS) AND BALDEO DAS AND OTHERS (DEFENDANTS) *

Hindu law—Wills acquired under will of deceased wife—Property devised subject to mortgages—Compromise of claims of reversioners to estate of wife's father—Nature of devisee's title not thereby altered.

One Munni Lal, died leaving certain property, of which his widow Jasoda Kunwar took possession. Jasoda Kunwar died leaving the property by her will to her daughter Anpurna, who also died after making a will leaving the property in question to her husband Ram Shankar Lal.

Both the wills provided that the devisee was to pay off certain incumbrances existing on the property. After the death of Anpurna the property was claimed by the reversionary heirs to Munni Lal's estate, but this claim was settled by a compromise by which Ram Shankar Lal gave certain land to the claimants in consideration of their entirely withdrawing their claim to the rest of the property.

Held that the compromise did not convey to Ram Shankar Lal the title of the reversioners; but that he took under the will of his wife and could not therefore raise any defence to a suit for sale brought by the mortgagees which Jasoda Kunwar or Anpurna could not themselves have raised. *Rani Mewa Kunwar* v *Rani Hulas Kunwar* (1), *Govind Krishna Narain* v. *Abdul Qayyum* (2) and *Bachha Kunwar* v. *Dharam Das* (3), referred to.

THIS was a suit for sale on a mortgage. The mortgage was executed on the 16th of March 1894, by Gaya Prasad and Jasoda Kunwar in favour of the predecessors in title of the plaintiffs. The mortgage comprised (1) certain immovable property formerly of Munni Lal, the husband of Jasoda Kunwar; (2) mortgagee rights in certain properties acquired after the death of Munni Lal by Jasoda Kunwar, and (3) property, partly proprietary rights and partly mortgagee rights belonging to Gaya Prasad. By her will dated the 9th of July 1894 Jasoda Kunwar left all her property to her daughter Anpurna, and Anpurna, on the 13th

* First Appeal No. 268 of 1904 from a decree of Babu Pramatha Nath Banerji, Subordinate Judge of Benares, dated the 8th of August 1904.

(1) (1874) L. R., 1 I. A. 157. (2) (1903) I L. R., 25 All., 546.
(3) (1906) 1 L. R., 28 All., 352.

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of February 1896, made a will in favour of her husband Ram Shankar Lal. Both mother and daughter died in February 1896. Both the wills above referred to provided that the legatee was to pay off incumbrances already existing on the property. In this suit Ram Shankar Lal pleaded, *inter alia*, that he was not liable to satisfy the mortgage debts inasmuch as he was not in possession under the will of Anpurna, but by virtue of a deed of acquittance executed in his favour by Bhagwan Das and Mata Badal, the nephews of Munni Lal, who were reversioners to the estate of Munni Lal after the death of Anpurna. The Court of first instance (Subordinate Judge of Benares) decreed the greater portion of the plaintiffs' claim, and from this decree the defendant Ram Shankar Lal appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Babu *Satya Chandra Mukerji* and Munshi *Gulzari Lal*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, Maulvi *Muhammad Ishaq Khan* and Babu *Durga Charan Banerji*, for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises in a suit brought for sale upon a mortgage executed on the 16th of March 1894, by Gaya Prasad and Musammat Jasoda Kunwar in favour of the predecessor in title of the plaintiffs respondents. Musammat Jasoda Kunwar was the widow of one Munni Lal, who died on the 8th of January 1883. They had a daughter named Anpurna Kunwar, who was married to the appellant Ram Shankar Lal. Both Jasoda Kunwar and Anpurna Kunwar died in February 1896. Jasoda Kunwar, before her death, made a will on the 9th of July 1894, in favour of Anpurna, and Anpurna, on the 13th of February 1896, made a will in favour of her husband Ram Shankar Lal. The latter is in possession of the bulk of the mortgaged property since the death of his wife Anpurna Kunwar. Gaya Prasad, one of the mortgagors, is also dead. He is represented in this suit by his son Baldeo Das. The properties comprised in the mortgage consisted of—

(1) certain immovable property which admittedly had belonged to Munni Lal;

(2) mortgagee rights in certain properties acquired by Musammat Jasoda Kunwar after Munni Lal's death; and

(3) property which stood in the name of Gaya Prasad consisting partly of proprietary rights and partly of mortgagee rights.

The Court below has decreed the claim save as to certain items of property, which, it has held, formed part of the estate of Munni Lal to which Jasoda Kunwar succeeded. Baldeo Das, the son of Gaya Prasad, has submitted to the decree. Ram Shankar Lal, who resisted the claim in the Court below, has preferred this appeal. An objection under section 561 of the Code of Civil Procedure has been filed by the plaintiffs respondents in regard to that portion of the claim which has been dismissed.

One of the pleas taken in this appeal was that no decree could be legally made for the sale of the mortgagee rights. This plea was supported by certain rulings of this Court, but, as we had doubts as to the correctness of those rulings, we referred the question to a Full Bench. The Full Bench has held that a decree for the sale of mortgagee rights can legally be passed in favour of a sub-mortgagee.* This decision of the Full Bench disposes of the 4th plea taken in the memorandum of appeal.

The first two pleas raised on behalf of the appellant are that no portion of the consideration for the mortgage in suit was received by Jasoda Kunwar and that she executed the mortgage under the influence of the other mortgagor Gaya Prasad.

As regards the first of these pleas, it appears that the mortgage in question was executed in lieu of two prior mortgages, one of which was made by Gaya Prasad and the other by Jasoda Kunwar. We have considered the evidence, and it is clear that there was valid consideration for the mortgage in suit.

As to the plea of undue influence, the Court below found against the appellant and the learned advocate was unable to refer us to any evidence which would warrant us in coming to a different conclusion.

It is next urged on behalf of the appellant that the properties comprised in the mortgage either belonged to Munni Lal or were acquired with funds left by him, and that such of the mortgaged properties as stood in the name of Gaya Prasad also belonged to Munni Lal, Gaya Prasad being only a *benamidar*. It is

* Supra, p 385.

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contended that this being so, the mortgagee was bound to prove legal necessity for the mortgage made by Jasoda Kunwar and that he had failed to do so.

On behalf of the respondents it is argued that it was not open to the appellant to raise the above contention, inasmuch as he derived title under the will of his wife Anpurna Kunwar, who again derived title under the will of her mother Musammat Jasoda Kunwar, and, as the appellant is admittedly not the reversioner to the estate of Munni Lal, he cannot set up any defence which Musammat Jasoda Kunwar could not have put forward. In our opinion this contention of the respondents must prevail.

We may mention that in the will whereby Jasoda Kunwar bequeathed the property to her daughter it was distinctly provided that she was to pay off the incumbrances already existing on the property. There is a similar provision in the will made by Musammat Anpurna in favour of the appellant. If, therefore, the appellant took the property under that will, he took it subject to the incumbrance in favour of the plaintiffs, and he cannot plead that he is not bound to discharge it. He, however, contended in the Court below in the 12th paragraph of his written statement, and he also contends here, that he is not in possession under the will, but has acquired the property by virtue of a deed of acquittance executed in his favour on the 21st of January 1898, by Bhagwan Das and Mata Badal, the nephews of Munni Lal, who were reversioners to his estate after the death of his daughter Anpurna. We have, therefore, to consider what title the defendant has acquired to the property. The document referred to above is printed at page 32 of the appellant's book. It recites that after the death of Anpurna "Ram Shankar Lal, her husband, has been, under a will executed by Musammat Anpurna Kunwar on the 13th and registered on the 14th of February 1896, in proprietary possession of the entire property mentioned in the said will." The above extract negatives the defendant's allegation that it was under this document and not under the will that he got possession. In our judgment the title of the appellant to the property in question is derived from the will of his wife and the document referred to above only affirms and recognizes that title.

After stating that disputes had arisen between Ram Shankar Lal and the executants regarding the validity of the will executed by Anpurna, and that the executants were contemplating the institution of a suit against Ram Shankar Lal for possession of the property, the document proceeds:—"But thinking that we, the executants, shall have to undergo a good deal of trouble in carrying on the litigation, and that the result of the suit was also uncertain, we settled the matter with Ram Shankar Lal aforesaid through the intercession of some of the members of the brotherhood in this way that Ram Shankar Lal aforesaid gave 11 bighas 17 biswas of land specified below, to us, and we, the executants, accepted and took the 11 bighas 17 biswas of land in lieu of our entire right which we had to the property left by Munni Lal and Musammat Jasoda Kunwar, our paternal uncle and aunt (respectively) and relinquish our claim to the entire movable and immovable properties, specified below, being the estate of Munni Lal and Musammat Jasoda Kunwar. We, the executants, and our heirs and representatives shall never have any kind of claim to or charge on the movable and immovable properties left by Munni Lal and Musammat Jasoda Kunwar." It is contended that this constitutes a transfer to Ram Shankar of the reversionary rights of Bhagwan Das and Mata Badal, the executants of the deed, and entitles him as representative of those persons to question the validity of the mortgage on any of the grounds on which those persons could have questioned it. We are unable to accede to this contention. We think that by this deed the executants of it, in view of the trouble and uncertainty which would attend a suit for possession of the property, relinquished their claim to the property, waived their claim to bring such a suit, and admitted the title by virtue of which Ram Shankar Lal was then in possession. It did not in our opinion clothe Ram Shankar Lal with all the rights which the executants had as reversioners to Munni Lal's estate. In support of this view we may refer to what was said in the following cases:—*Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (1), *Gobind Krishna Narain* v. *Abdul Qayyum* (2), *Bachhe Kunwar* v. *Dharam Das* (3). As

(1) (1874) L. R., 1 I. A., 157, at p. 166 (2) (1903) I. L. R., 25 All., 546, at p. 575

(3) (1906) I. L. R., 28 All., 362.

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observed by their Lordships of the Privy Council in the case first mentioned, the deed of acquittance, which in reality is a compromise, "is based on the assumption that there was an antecedent title of some kind" and it "acknowledges and defines what that title is." In this view Ram Shankar Lal took the property under the will made in his favour and under the terms of the will he took it subject to the liabilities which existed on it.

This relieves us of the necessity of considering the question as to what portion, if any, of the mortgaged properties formed part of Munni Lal's estate and whether there was legal necessity for the mortgage.

In this view the plaintiffs are entitled to a decree for sale of the whole of the property covered by the mortgage. The result is that we dismiss the appeal with costs and allow the objections of the respondents under section 561 of the Code of Civil Procedure with costs. We vary the decree of the Court below by directing that the decree be for the sale of all the property comprised in the mortgage. We extend the time for payment of the mortgage money to the 26th September 1907. Up to that date the plaintiffs will get interest on the amount of the mortgage debt at the contract rate and thereafter at 6 per cent. per annum until date of realization.

Decree modified.

FULL BENCH.

1907
April 5.

Before Sir John Stanley, Knight, Chief Justice, Mr Justice Sir George Knox and Mr Justice Richards.

BIHARI LAL (DEFENDANT) *v.* CHUNNI LAL (PLAINTIFF).*

Civil Procedure Code, sections 521, 522—Arbitration—Award—Decree on judgment in accordance with the award—Appeal.

The matters in dispute between the parties to a suit pending in the Court of a Munsif were referred to arbitration. An award was delivered by the arbitrator to which objections were filed to the effect that the arbitrator had been guilty of misconduct. Those objections were, however, overruled and decree was passed which was in accordance with, and not in excess of, the terms of the award.

Held that no appeal from such a decree would lie, the sole ground being that the arbitrator had been guilty of misconduct. *Sham Lal* v *Mian Kunwar* (1) distinguished. *Ghulam Khan* v. *Muhammad Hassan* (2) followed.

THIS appeal was referred to a Full Bench upon the recommendation of Knox and Richards, JJ., and for the reasons stated in the referring orders, which were as follows. The facts of the case appear from the referring order delivered by Knox, J.

KNOX, J.—This appeal is brought from an order passed under section 562 of the Code of Civil Procedure. The matter in dispute between the parties had been at their request referred to arbitration by the Court which was trying the suit. The arbitrator appointed by the Court returned an award, and to the award so returned objection was taken by the plaintiff in the suit under section 521 of the Code of Civil Procedure. He set out in his objection certain facts, and upon those facts charged the arbitrator with misconduct. The learned Munsif, before whom the award was, considered the award and the objection and came to this conclusion :—"No misconduct has been shown, and the objection is only frivolous and vexatious." The plaintiff then went in appeal, and the appeal was heard by the Additional District Judge of Aligarh. He considered afresh the alleged misconduct and found that the circumstances of the case sufficiently warranted misconduct on the part of the arbitrator as

* First Appeal No. 75 of 1906 from an order of BABU KSHITSA MOHAN GHOSH, Second Additional Judge of Aligarh, dated the 8th of June 1906.

(1) Supra, p. 426. (2) (1901) I. L. R., 23 Calc., 167.

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explained in the case of *Ganga Sahai* v. *Lekhraj Singh* (1). He held that the award was in his opinion bad in law; set aside the decree which had been given upon the award, and remanded the case under section 562 of the Code of Civil Procedure. It has nowhere been suggested, and indeed it cannot be suggested, that the decree which the Munsif gave was in excess of, or not in accordance with, the award.

Before us it is contended that the lower appellate Court has no jurisdiction to hear the appeal which was presented to it, and, but for a decision to which I shall presently refer, I should have held that both by Statute and by a Full Bench ruling of this Court the matter was concluded and that no appeal did lie. It is contended for the respondent that the provisions of section 522 are not exhaustive and that under section 540 an appeal does lie from the decree. Now section 540 runs as follows:—"Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." It seems to me, especially bearing in mind that the right of appeal is a right created by Statute and does not lie where the Statute does not make provision for it, that section 522 is one of the exceptions to which section 540 refers when it says that "unless when otherwise expressly provided by this Code, etc." There is further a Full Bench Ruling of this Court—*Ibraham Ali* v. *Mohsin Ali* (2), and there is the Privy Council judgment in *Ghulam Khan* v. *Muhammad Hassan* (3). In this last named case the same contention that section 522 was not exhaustive was raised, and in spite of it their Lordships of the Privy Council held that they "would be doing violence to the plain language and the obvious intention of the Code, if they were to hold that an appeal lies from a decree pronounced under section 522, except in so far as the decree may be in excess of or not in accordance with the award. The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decision

(1) (1887) I. L. R., 9 All., 253. (2) (1896) I. L. R., 18 All., 422.
(3) (1901) I. L. R., 29 Calc., 167.

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in this country. The time has long gone by since the Courts of this country showed any disposition to sit as a Court of Appeal on awards in respect of matters of fact." See *Adams* v. *Great North of Scotland Railway Company* (1).

The learned vakil for the respondent, however, called our attention to a very recent case—*Sham Lal* v. *Misri Kunwar*, F. A. No. 98 of 1905. The decision is one entitled to our most careful consideration, but, with the utmost respect to the learned Judges who decided it, I find it impossible to distinguish that case from the present, and, in view of the circumstances already set out, to follow it. So far as I can see the ruling of their Lordships of the Privy Council reported in I. L. R., 29 Calc., 167, was not cited. In *Sham Lal* v. *Misri Kunwar* the objection of misconduct was taken in the Court to which the award was returned, and the Court overruled it in the following words:—"I hold that the arbitrator did hold meetings and make inquiry and did make the award." This was a finding by the Court in spite of the arbitrator himself having said that the award submitted by him was a bogus award. As so much stress is laid upon this case, I think it better to refer this case to a Full Bench in order that the point that arises, *viz.*, whether, when an objection of misconduct to an award has been heard and decided by the Court to which an award was returned, and the objection has been overruled, and the decree which followed upon the award is not in excess of and is in accordance with the award, an appeal still lies upon any point, or whether that decree is not as regards appeal absolute and final.

RICHARDS, J.—This is an appeal from a decree made on an award. It is not alleged that the decree is in excess of or not in accordance with the award. The defendant contends that under the provisions of section 522 of the Code of Civil Procedure no appeal lay to the lower appellate Court. Section 506 of the Code provides that the parties may refer any matter in difference between them in suit to arbitration. Due care is taken that the matters shall only be referred to arbitration when the parties make the application in person or through their pleaders, who must be specially authorized in writing to do so. Parties are not

(1) L. R., 1891, A. C., 31.

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bound to refer their differences to arbitration. They do so entirely of their own motion and of their own accord. Section 521 provides that no award made after matters have been referred shall be set aside except on certain grounds which are specified in the section. Section 522 provides that if no application is made to set aside the award, or if the Court after hearing an application to set aside the award has refused to do so, the Court shall proceed to give judgment according to the award. The section then continues:—"Upon the judgment so given a decree shall follow . . . . No appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award." It seems to me very clear that the Legislature intended that where parties of their own free will submit their differences to arbitration, they should have the opportunity of attacking the award provided by section 521 and no other opportunity. Parties who submit their differences to arbitration must be taken to have notice of the provisions of the Code. They cannot complain if in occasional cases a decree follows a doubtful or even a bad award. This seems to me to be the view that was taken of the section by the Privy Council in the case referred to by my learned colleague. The attention of the Court when deciding the First Appeal No. 98 of 1905 does not appear to have been called to the case of *Ghulam Khan* v. *Muhammad Hassan* (1).

On this the appeal was directed to be laid before a Bench consisting of the Chief Justice and Knox and Richards, JJ.

Munshi *Gulzari Lal*, for the appellant, submitted that the Court of first instance having overruled the objections taken to the award and made a decree in accordance therewith, the lower appellate Court had no jurisdiction to touch that decree even if the award were void—*Ghulam Khan* v. *Muhammad Hassan* (1). But here the award was not void: it was impeached only on the ground of misconduct, and the decision of the first Court upon this question was final—*Ibrahim Ali* v. *Mohsin Ali* (2).

Dr. *Satish Chandra Banerji*, for the respondent, submitted that an appeal would lie from a decree purporting to be passed in accordance with a so-called award where there was no award

(1) (1901) I. L. R., 28 Calc., 167. (2) (1896) I. L. R., 18 All., 422.

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in law. Section 522 of the Code of Civil Procedure presupposes a valid and legal award. This was the established doctrine of all the Indian Courts before the Privy Council judgment in *Ghulam Khan's* case was pronounced, and that had not in any way altered the law. Here the award was bad in law for "the refusal to receive proof where proof is necessary is fatal to the award"—Russell on Arbitration, 9th ed., p. 143 The case of *Sham Lal* v. *Misri Kunwar* (1) was in point, for there the objection taken to the award was one purely of misconduct, and it was treated and adjudicated upon as such in the Court below; and in the High Court it was held that there was "no legal award" by reason of the grave misconduct of the arbitrator.

The appellant was not called on to reply.

STANLEY, C.J.—I am clearly of opinion that no appeal lies in this case. Section 522 of the Code of Civil Procedure provides that where a decree has been passed in accordance with an award "no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award." All that is alleged in this case is that the arbitrator was guilty of misconduct. It is admitted that the decree is in accordance with, and not in excess of, the award. This being so, it appears to me that the Legislature in very clear terms has prohibited the institution of an appeal. There appears to have been some misapprehension of a judgment delivered by a Bench of this Court of which I was a member in F. A. No. 98 of 1905 *(Lala Sham Lal and another* v. *Musammat Misri Kunwar)*. In that case I and my colleague set aside a decree passed upon a so-called award, on the ground as clearly appears from the judgment that there was no award in fact or in law. The arbitrator who is said in that case to have made the award, was examined and he deposed that he did not make any award in the presence of the parties; that the award then before the Court was in his bag, but that he did not intend to make it; that it was "only to threaten the parties that he kept in his bag the award and also another of an entirely contrary nature." The suggestion in that case made by the learned counsel for the appellant was that somebody had abstracted this so-called award from the bag and filed it in Court.

(1) *Supra*, p. 426.

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We were not disposed to entertain that suggestion, but both my colleague and myself came to the conclusion that the paper which was filed was not intended by the arbitrator to be his award or to be the basis of a decree, and therefore it was we set aside the decree. That is not the case here. The case here is that of an award actually prepared by the arbitrator and filed in Court by him—an award which he intended should be acted upon and should form the basis of a decree. It is alleged that he was guilty of misconduct in not hearing the evidence of certain witnesses. If he was guilty of misconduct, the course open to the parties was to proceed under section 521. It appears to me that the question before us is concluded by the decision of their Lordships of the Privy Council in the case of *Ghulam Khan* v. *Muhammad Hassan* (1). I would, therefore, allow the appeal.

KNOX, J.—I am also of opinion that in this case there was an award, and all that was alleged against the award was misconduct on the part of the arbitrator. The alleged misconduct was inquired into and the Court finding no misconduct proved, overruled the objection and passed a decree which was in accordance with and not in excess of the terms of the award. The result was that no appeal lay to the District Judge, and the order of remand passed by him must be set aside.

The learned Chief Justice has distinguished the case which was relied on by the learned advocate for the respondent and shown that it has no application to the case before us.

RICHARDS, J.—I also allow the appeal. My reasons are given in the order of reference delivered on the 15th of March 1907.

BY THE COURT.—The order of the Court is that the appeal be allowed and the order of remand of the lower appellate Court be set aside and the decree of the Munsif of Kasganj be restored with costs in all Courts.

Appeal decreed.

(1) (1901) I. L. R., 29 Calc., 167.

APPELLATE CIVIL.

1907
April 5

Before Mr Justice Aikman.

SHEO NARAIN (DEFENDANT) v NUR MUHAMMAD AND ANOTHER (PLAINTIFFS) *

Execution of decree Sale in execution Purchase of share in property to some extent unincumbered—Presumption—Civil Procedure Code, section 318—Act No XV of 1877 (Indian Limitation Act) schedule II, article 136—Suit for possession

Where in execution of a simple money decree an undivided share in immovable property, part of which was subject to mortgages, was sold, it was *held* that in the absence of specific indications to the contrary it must be presumed that the share sold was, as far as might be, the share which was not incumbered.

Held also that the fact that an application under section 318 of the Code of Civil Procedure made by an auction-purchaser has been rejected as made beyond time is no bar to a suit for possession of the property purchased. *Seru Mohun Runa* v *Bhagoban Din Pandey* (1) and *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2) followed.

THE facts of this case are as follows:—

One Param Singh owned an undivided share in a village, amounting to 9 annas 11 pies, 8 chataks. Out of this share he mortgaged 4 annas to Sheo Narain. Another 2 anna share he mortgaged to one Magan Lal. The rest was free from incumbrances. One Kale Khan, the predecessor in title of the plaintiffs, held a simple money decree, against Param, in execution of which a 4 anna share was attached and sold, and purchased by Kale Khan and Lal Khan for Rs. 100. In February 1902, the plaintiffs applied under section 318 of the Code of Civil Procedure to be put into possession of the property purchased. This application was, however, rejected on the 1st March 1902 as beyond time. The plaintiffs then instituted the present suit to obtain possession of the share purchased by them. The unincumbered residence of Param's original share was represented by 8 annas, 11 pies and 8 chataks, and this had been given by Param's widow, Musammat Maharani to Sheo Narain.

The Court of first instance (Munsif of Lalitpur) found that the share purchased by the plaintiffs was the 4 anna share

* Second Appeal No 521 of 1905, from a decree of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 8th of March 1905, reversing a decree of Babu Ladli Prasad, Munsif of Lalitpur, dated the 3rd of January 1905.

(1) (1883) I. L. R., 9 Calc., 602. (2) (1887) I. L. R., 14 Calc., 644.

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mortgaged to Sheo Narain and subject to his decree. The lower appellate Court, however, came to a different conclusion and decreed the plaintiffs' suit. The defendant Sheo Narain appealed to the High Court.

Mr. *G. W. Dillon* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the appellant.

Hon'ble Pandit *Sundar Lal*, for the respondents

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiffs respondents to obtain possession of certain immovable property under the following circumstances. One Param owned an undivided share in a village. The extent of his share was 9 annas 11 pies 8 chataks, that is, he held a 10 anna share all but a very small fraction. Of this share he mortgaged to Sheo Narain, defendant, appellant here, a 4 anna share. Another 2 anna share he mortgaged to one Magan Lal. The rest was free from incumbrance. Kale Khan, the predecessor in title of the plaintiffs, held a simple money decree against Param, in execution of which he applied for attachment of a 4 anna share out of Param's estate. A 4 anna share was attached, sold and purchased by Kale Khan and Lal Khan on the 20th of April 1895 for a sum of Rs. 100. In February 1902, the plaintiffs applied under section 318 of the Code of Civil Procedure to be put into possession of the property purchased. Their application was rejected on the 1st of March 1902 as beyond time. The plaintiffs thereafter instituted the suit out of which this appeal arises to obtain possession of the property which they alleged they had bought. The mortgage in favour of the appellant Sheo Narain was a mortgage by conditional sale. At the time when Kale Khan put his simple money decree into execution, Sheo Narain had already got a decree *nisi* for foreclosure, which was subsequently made absolute. Magan Lal, the other mortgagee, also got his mortgage against the 2 anna share enforced by a decree. Param then died. His widow Musammat Maharani made a gift of the remaining 3 anna 11 pie 8 chatak share to the appellant Sheo Narain. The suit is to recover possession of that share as representing what was sold at the auction to the predecessor in title of the plaintiffs. The Court of first instance found that the share purchased at auction was the 4 anna share

mortgaged to Sheo Narain and subject to his decree. On appeal the learned District Judge came to the opposite conclusion and decreed the plaintiffs' suit. The defendant Sheo Narain comes here in second appeal. The case has been very fully and ably argued by his learned counsel. But the arguments of the learned counsel have failed to satisfy me that the decision of the learned District Judge is wrong. At the time of the attachment in execution of the simple money decree, the judgment-debtor Param possessed only the equity of redemption in 6 annas out of his estate, the remainder, *i.e.*, 4 annas all but a minute fraction, was unincumbered. There is nothing to show that when the decree-holder applied for attachment of a 4 anna share in execution of his money decree, he meant to or did apply for the attachment of an incumbered 4 anna share of his judgment-debtor. The presumption would be entirely against his having done so. The sale notification has not been produced, and there is nothing to show what was advertised for sale. In the paper showing the property attached in execution of the simple money decree it is described as a "4 anna share in mauza Jagatpura, valued at Rs. 50 standing in the name of Param." No mention is made in this *fard-i-taliqa* of any incumbrance. The learned counsel relies upon a paper which has been produced and which is called *fard-i-lát*, or list of purchasers at auction. It is true that in this there is a reference to an incumbrance of Rs. 148. How this came to be entered in the *fard-i-lát* is explained by the learned Judge. The share advertised for sale being an undivided 4 anna share and 6 annas of Param's property being under mortgage, a *portion* of the 4 anna share attached must in any case have been subject to incumbrance. I fully agree with the learned District Judge in holding that the presumption is in favour of the auction purchaser having bought unincumbered property so far as it was possible for him to do so. This disposes of the first three pleas in the memorandum of appeal. The fourth plea was based upon the decision in the case of *Raja Inayat Singh* v. *Izzat-un-nissa Begam* (1). In my opinion that case is distinguishable from the present case, for there, on the application of the auction purchaser himself, the property had been

(1) (1904) I. L. R., 27 All., 97.

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notified as subject to incumbrance, which is not the case here. The last plea is that such a suit as this is not maintainable. In my opinion there is no force in this plea. The suit is one of the suits described in article 138, schedule II, of the Limitation Act. The mere fact that the auction purchasers or their representatives failed to apply within time to be put in possession under section 318 of the Code of Civil Procedure does not deprive them of their right to bring a regular suit, *vide Seru Mohun Bania* v. *Bhagoban Din Pandey* (1), *Kishori Mohun Roy Chowdhry* v. *Chunder Nath Pal* (2). I have not been referred to any case in which an opposite view has been taken. For the above reasons I am of opinion that the appeal fails, and it is dismissed with costs.

Appeal dismissed.

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April 8

REVISIONAL CIVIL.

Before Mr Justice Richards.

ASHIQ ALI (PETITIONER) v. MOTI LAL (OPPOSITE PARTY).*

Civil Procedure Code, section 336—Insolvency—Security for filing application by judgment-debtor to be declared insolvent

The petitioner gave security for one Aziz, who had been arrested in execution of a decree He deposited a sum of money in Court on condition if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. The judgment-debtor duly presented his application for a declaration of insolvency, but before any order could be passed on it he died *Held* that the condition of the security was not fulfilled, and the decree-holder was not entitled to the money deposited by the surety. *Krishnan Nayar* v. *Ittiman Nayar* (3) referred to.

ONE Aziz having been arrested in execution of a Civil Court decree, one Syed Ashiq Ali deposited a sum of money for him in Court as security. The terms of the security were that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. Aziz duly made his application to be declared insolvent; but before any

* Civil Revision No. 64 of 1906.

(1) (1883) I. L. R., 9 Calc., 602. (2) (1887) I. L. R., 14 Calc., 644.
(3) (1901) I. L. R. 24 Mad., 637.

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order could be made on it he died, on the 16th April 1906. On the 19th April 1906, the decree-holder applied for the payment to him of the money deposited by Syed Ashiq Ali. The Court, however, refused this application, but subsequently, on a fresh application, made to it, directed that the money should be paid. Against this order Syed Ashiq Ali applied in revision to the High Court.

Munshi *Gokul Prasad*, for the applicant.

Dr. *Satish Chandra Banerji*, for the opposite party.

RICHARDS, J.—A decree was obtained against one Aziz. In execution of that decree Aziz, the judgment-debtor, was arrested. After some time Syed Ashiq Ali deposited a sum of money as security in Court. The terms of security were that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. Aziz duly made his application to be declared insolvent. Before any order could be made Aziz, the judgment-debtor, died on the 16th of April 1906. On the 19th of April the decree-holder applied to the Court that the money deposited by Syed Ashiq Ali should be paid to him. The Court made an order on the 21st of April refusing this application on the ground that the security was only given to secure the appearance of the judgment-debtor. The learned Judge had evidently in his mind the provisions of section 336 of the Code of Civil Procedure, which provides that when a judgment-debtor is arrested the Court is to release him if he furnishes security *that he will appear when called upon and will within one month apply to be declared insolvent.* On the 24th of April the decree-holder made a fresh application that the money should be paid to him and on the 24th of May 1906, notwithstanding the order of the 21st April 1906, the Court ordered that the amount deposited by Syed Ashiq Ali be paid over to the decree-holder. This is the order which the applicant now asks to set aside in revision. The security which was furnished was not in strict accordance with the provisions of section 336. The security went so far as to undertake that if the application of the judgment-debtor to be declared insolvent was rejected, on any ground whatever, the money should be paid to the decree-holder. It seems to me that

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on the merits the decree-holder was not entitled to get this money. The application of the judgment-debtor was never rejected. His death rendered an order under section 351 of the Code of Civil Procedure impossible, and even assuming that the security was bound to the full extent of his undertaking when he deposited the money, in my judgment, the Court ought to have given back to him the money deposited after the death of the judgment-debtor. The decree-holder contends that, even assuming that the decision complained of is wrong, this Court ought not to interfere in revision. This contention is met by the applicant by pointing out that so long as the order of the 21st of April stands, the lower Court had no jurisdiction whatever to make the order of the 24th of May 1906. Under all the circumstances I think that this is a case which I should entertain in revision. As I do entertain it, I think on the general merits Syed Ashiq Ali is entitled to the money deposited in Court. In an exactly similar case—*Krishnan Nayar* v. *Ittiman Nayar* (1) it was held that where the judgment-debtor died before the expiration of the time granted for making an application for insolvency, the security was released. I allow the application and set aside the order of the 24th of May 1906. I make no order as to costs.

Application allowed.

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April 12

Before Mr. Justice Richards

J. G. WILLIS AND OTHERS (APPLICANTS) v. JAWAD HUSAIN AND OTHERS (OPPOSITE PARTIES)*

Civil Procedure Code, sections 622, 623, 626 *and* 629—*Review of judgment—Application for review rejected—Revision—Small Cause Court suit*

An application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency in the court fee paid upon the application. *Held* that this order was open to revision. *Ram Lal* v. *Ratan Lal* (2) distinguished.

THIS was an application in revision arising out of a suit in a Small Cause Court in which the plaintiffs claimed a sum of 60 or 65 rupees alleged to be due by the representative of a deceased pleader to them as executors of the Will of one T. A. Martin. The defendants contested the suit and claimed a set-off amounting

* Civil Revision No. 48 of 1906

(1) (1901) I. L. R., 24 Mad., 627. (2) (1904) I. L. R., 26 All., 572.

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to about Rs. 120. The Court of Small Causes dismissed the plaintiffs' suit and decreed the whole set-off claimed by the defendant. The plaintiffs applied for a review of judgment within the period of 90 days allowed for such an application, and paid a court fee of Rs 4-8-0. The Court, however, without going into the merits of the application for review, decided that the plaintiffs should have paid a court fee upon their claim and also on the amount claimed as a set-off by the defendants, and rejected the application without giving time to pay in the deficiency. The plaintiffs thereupon applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicants.

Mr. *Kamamat Husain*, for the opposite parties.

RICHARDS, J.—In this case the plaintiffs sued for a sum between Rs. 60 and Rs. 65 alleged to be due by the representatives of a deceased pleader to them as executors of the Will of one T. A. Martin, deceased. The defendants contested the claim of the plaintiffs and claimed a set-off amounting to about Rs. 120. The case was heard by the Judge of the Small Cause Court, who dismissed the plaintiffs' suit and decreed the whole set-off claimed by the defendants. An application was made for review of judgment and the plaintiffs paid a court fee of Rs. 4-8 The Court below, without going into the merits of the application for review of judgment, decided that the applicants should have paid a court fee to cover a sum equivalent to the amount claimed by the plaintiffs in their plaint plus the amount claimed by the defendants as set-off. No time was given to the applicants to pay this additional court fee. The application for review of judgment was made within 90 days from the date of the decree. The plaintiffs now seek to set aside the order rejecting the application for review on the ground that the court fee paid by them was more than sufficient and that they in any event should have been allowed time to pay the additional court fee. Article 5 of the first schedule of the Court Fees Act of 1870 expressly provides that where an application for review of judgment is made within 90 days and where there has been no appeal, the proper fee payable by the applicants is one half of the fee leviable on the plaint. The fee on the plaint in the present case which was to recover a sum between Rs. 60 and Rs. 65 was a sum of Rs. 4-14. It seems to me quite clear that

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the applicants were entitled to present their application for review of judgment by paying a court fee of Rs. 2-7. I cannot see that the fact that the defendants claimed a set-off amounting to Rs. 120 made any difference. In my judgment the learned Judge of the Small Cause Court was clearly wrong in rejecting the application for review of judgment on the ground of court fee. It is said, however, that section 629 of the Code of Civil Procedure expressly enacts that an order rejecting an application for review is final, and in support the learned counsel for the opposite side has cited the case of *Ram Lal* v. *Ratan Lal* (1). In that case there had been a decision on the merits by the Court whose order it was sought to set aside in revision, and the learned Judges were of opinion that none of the facts in that case fell within any of the three contingencies specified in section 622 of the Code of Civil Procedure. The present case differs in two important respects. In the first place this is an application for revision of a decision of a Small Cause Court, and secondly, there was no decision on the merits. On reference to section 623 of the Code of Civil Procedure it will be seen what are the proper and only grounds on which an application can be made for review of judgment. Section 626 provides that the Court may reject the application if it considers that there are no sufficient grounds for review. I think this section clearly refers to a consideration of the application on the merits, and if in the present case there had been a consideration of the case on the merits, I would have no hesitation in rejecting the present application. I wish it clearly to appear that I express no opinion whatever on the general merits of the case. My decision is confined to a decision that the ruling of the Court below as to the court fee was erroneous and that it ought to have heard the application. I therefore allow the application and set aside the order complained of and remand the case to the Court below to hear and determine the application in accordance with law. Costs of this application will abide the result.

Application allowed.

(1) (1904) I. L. R., 26 All., 572.

APPELLATE CIVIL.

1907
April 16

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

HUSAINI KHANAM AND ANOTHER (PLAINTIFFS) v. HUSAIN KHAN AND OTHERS (DEFENDANTS).*

Act No IV of 1882 (Transfer of Property Act), sections 62 and 63—Mortgage—Redemption—Act No XV of 1877 (Indian Limitation Act), schedule II, article 134—Mortgage by mortgagee purporting to be of a proprietary interest in the mortgaged property—Foreclosure

Under ordinary circumstances a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem the mortgage *Brown* v. *Cole* (1), *Vadju* v. *Vadju* (2), *Raghubar Dayal* v. *Budhu Lal* (3) and *De Bream* v. *Ford* (4) referred to.

The widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to *A H* The donee mortgaged part of the property, the subject of this gift, to *P N*, purporting to mortgage the full proprietary interest in the property. *P. N* took proceedings for foreclosure against *A. H.* as absolute owner and obtained foreclosure and possession of the property. *Held*, on the finding that *P. N.* acted *bonâ fide* and had no reason to suppose that *A. H* was not, as he represented himself to be, the full owner of the property mortgaged, that *P. N.* was entitled as against the representative of the original mortgagor to the protection afforded by article 134 of the second schedule to Act No. XV of 1877.

Ahamed Kutti v. *Raman Nambudri* (5) and *Ram Chandra Vithal* v. *Sheikh Mohidin* (6) distinguished. *Bhagwan Sahai* v. *Bhagwan Din* (7), *Radanath Dass* v. *Gisborne and Co.* (8), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (9), *Behari Lal* v. *Muhammad Muttaki* (10), *Maluji* v. *Fakir Chand* (11), *Manavikraman Ettan Thamburan* v. *Amma* (12) and *Narayan* v. *Shri Ram Chandra* (13) referred to.

THIS was a suit to redeem a mortgage of the 6th of January 1830, executed by Mirza Aman Ali and Agha Fateh Ali in favour of Muhammad Ata-ullah Khan to secure an advance of Rs. 19,500. The mortgage comprised twelve villages situated in the district of Cawnpore. The plaintiff claimed to be the daughter of Aga Fateh Ali, who survived Aman Ali, and as such became entitled to the equity of redemption in the mortgaged

* First Appeal No. 91 of 1904, from a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 4th of January 1904.

(1) (1844) 14 Sim., 427
(2) (1880) I. L. R., 5 Bom., 22.
(3) (1885) I. L. R., 8 All., 95.
(4) (1900) L. R., 1900, Ch., 142.
(5) (1901) I. L. R., 25 Mad., 99.
(6) (1899) I. L. R., 23 Bom., 614.
(7) (1886) I. L. R., 9 All., 97.
(8) (1889) 14 Moo., I. A. 1.
(9) (1891) I. L. R., 15 Bom., 582.
(10) (1895) I. L. R., 20 All., 452
(11) (1896) I. L. R. 22 Bom., 235
(12) (1900) I. L. R., 24 Mad., 471
(13) (1903) I. L. R., 27 Bom., 378

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property. The plaintiff's case was that the mortgage was created by two contemporaneous documents of the 6th of January 1830, namely, a sale deed in favour of Ata-ullah Khan, and an ikrarnama by which Ata-ullah Khan agreed to re-convey the properties to Aman Ali and Fateh Ali on payment of Rs. 19,500 and interest on the expiration of a term of nine years. Ata-ullah Khan was succeeded on his death, in 1843, by his widow Sahib Begam, who, on the 13th of March 1862, gave the property to the defendant Ali Husain Khan. The other defendants are transferees from him. On the 7th of January 1867 Ali Husain Khan mortgaged by conditional sale without possession to one Prag Narain five of the villages, and Prag Narain dedicated these five villages to the idol Sri Rukmini Kishen Das. On the 13th of February 1871, Prag Narain, as the manager of the temple of Sri Rukmini, took foreclosure proceedings, and on the 19th of June 1872 obtained an order for foreclosure, and followed this up by a suit for possession, and on the 2nd of August 1872 obtained possession of the five villages. In the plaint it was alleged that according to the terms of the mortgage whenever the mortgage money had been satisfied out of the usufruct of the property or by payment before or after the stipulated period the property would be redeemable, and that the principal and interest had in fact been satisfied in 1200 Fasli, that is, before the expiration of the 9 years term of the mortgage.

The defendants pleaded *inter alia* that the claim was barred by 60 years' limitation, and as regards the five villages which were dedicated to Sri Rukmini that it was barred by the rule of limitation prescribed by article 134 of schedule II to the Indian Limitation Act.

The Court of first instance held that the suit was barred by limitation and dismissed it. That Court also found that the plaintiff was not, as she professed to be, the daughter of Agha Fateh Ali.

The plaintiffs appealed to the High Court.

Messrs. *Karamat Husain*, *Abdul Majid* and *B. E. O'Conor*, for the appellants.

Messrs. *A. E. Ryves*, *W. Wallach* and Pandit *Moti Lal Nehru*, for the respondents.

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The High Court (STANLEY, C. J., and BURKITT, J.) found on the facts that the plaintiff Husaini Khanam was, as she alleged, the daughter of Fateh Ali. As to the issue whether the plaintiff's suit was barred by the sixty years' rule of limitation, and as to the other points of law raised by the appeal the judgment of the Court—after discussing the documentary evidence as to the original mortgage of 1830, and its bearing upon the question whether that mortgage was redeemable within nine years or only after the expiration of the period—continued as follows:—

Ordinarily a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation—*Brown* v. *Cole* (1). Westropp, C. J., in his judgment in *Vadju* v. *Vadju* (2) says:—"The general principle as to redemption and foreclosure is that in the absence of any stipulation expressed or implied to the contrary the right to redeem and the right to foreclose must be regarded as co-extensive." In that case the stipulation in the mortgage deed was that the mortgagor would pay the debt within ten years and redeem the mortgaged property, and it was held that a suit for redemption instituted within the ten years was premature, the mere use of the word "within" not being a sufficient indication of an intention that the mortgagor might redeem in a less period than ten years. So in *Raghubar Dayal* v. *Budhu Lal* (3), in which the stipulation was that the principal and the interest should be paid at the promised time (that was in ten years), it was held that the advance by the mortgagee to the mortgagor was for a period of ten years certain, and that the mortgagor was not entitled before that period had expired to redeem the property. The principle acted upon in these cases is embodied in the Transfer of Property Act. Section 60 provides that "at any time after the principal money has become payable" the mortgagor may redeem. Section 62 prescribes in the case of a usufructuary mortgage, that the mortgagor has a right to recover possession of the property where the mortgagee is

(1) (1844) 14 Sim., 427. (2) (1882) I. L. R., 5 Bom., 22.
(3) (1885) I. L. R., 8 All., 36.

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authorized to pay himself from the rents and profits the interest of the mortgage debt, "when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money, &c." Also in section 67, in which the right of foreclosure or sale is prescribed, the language is as follows:—"In the absence of a contract to the contrary the mortgagee has, at any time after the mortgage money has become payable to him, &c.," a right to obtain an order for foreclosure or sale. The principal money only becomes payable when the payment becomes obligatory upon the mortgagor. Lindley, M. R., in the case of *De Braam* v. *Ford* (1), commenting on the meaning of the words 'time of payment' contained in a bill of sale, observes:—"To my mind the expression is unambiguous: it means the time at which payment is to become obligatory, the time at which the borrower must pay and after which, if he does not pay, he can be sued for payment."

On the evidence afforded by the proceeding before the Collector we are of opinion that the agreement of the parties was that the advance made by Ata-ullah Khan was to be left outstanding for a period of nine years, and that within that period the mortgagee could not foreclose the mortgage nor could the mortgagors redeem it. The learned Subordinate Judge appears to have been of this opinion also, for he says in his judgement:—"The mortgage was, no doubt, for a term of nine years." But then he holds that by reason of the statement by the plaintiffs in the plaint that the debt was actually satisfied out of the usufruct within the period, the plaintiffs could not rely on this fact. He also seems to hold that it was optional with the mortgagor to redeem whenever he pleased, and that therefore the period of limitation ran from the date of the mortgage. After referring to some rulings he says:—"Having regard to the terms of the mortgage in this case and to the plaintiffs' allegations I am bound to hold, following the above rulings, that the period of limitation in this case will run from the date of the mortgage, *viz.*, the 6th of January 1830, and the suit was beyond time on the 6th of January 1899, when it was instituted." We are unable

(1) L. R., 1900, 1 Ch., 142.

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to agree with him as to this. The time began to run, we think, from the expiration of the term of nine years, and the mere fact that the plaintiffs alleged that the mortgage debt was satisfied within this period, does not affect the question.

The next point upon which Mr. *Ryves* on behalf of the principal respondents relied was as to the sufficiency of the stamp upon the plaint. The suit is one for redemption, but the plaintiffs in their plaint alleged that a large surplus was due to them and in the plaint they asked that this surplus should be paid to them. Appended to the plaint is given a statement showing the amount of receipts and disbursements according to the settlements of 1247 and 1282 Fasli and bringing out a large balance of over two lakhs, as due to the mortgagors. The Munsarim found that the court fee of Rs. 765 paid by the plaintiffs in respect of the claim for redemption was sufficient, but that no court fee had been paid in respect of the surplus of profits claimed by them. He held that a further court fee of Rs. 2,220 was payable, and an order was passed directing the plaintiff to make good the deficiency. On the 21st of January 1899 the plaintiffs applied for three weeks' time to make good the deficiency, but this application was rejected on the 23rd of January, and on the 25th of January 1899 an order was passed by the Subordinate Judge directing the plaint to be registered, subject to any objection the defendants might raise. The principal defendants raised the preliminary objection that the plaint should have been rejected owing to the fact that the deficiency in the court fee had not been made good by the plaintiffs within the period fixed by the Court, and also on the ground that as there was no sufficiently stamped plaint presented to the Court before the expiry of sixty years, the claim was beyond time. These objections were disallowed, and on the 25th of September 1899 the plaintiffs were allowed to withdraw their claim for mesne profits with liberty to sue again in respect of such profits. There are two answers to the contention of Mr. *Ryves*. The first is, that the suit is for redemption, and that the mere fact that the plaintiffs claimed in the suit payment of any sum which might be found to be due to them on the taking of the accounts, a relief to which they would be entitled under the ordinary

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decree for redemption, did not alter the nature of the suit so as to necessitate the payment of an additional fee. Section 7, sub-section 9 of the Court Fees Act provides that in a suit for redemption the court fee shall be valued at the principal amount secured by the mortgage. As a suit for redemption only a proper court fee has been paid. Another answer is that section 373 of the Civil Procedure Code empowered the Court to allow the plaintiffs to abandon part of their claim with liberty to bring a fresh suit in respect of the part so abandoned, if it was satisfied that the suit must fail by reason of a formal defect or that there were sufficient grounds for permitting them to abandon part of their claim. This section was intended to meet, amongst other cases, a case in which there had been an improper valuation of the stamp. Sir J. W. Colvile in *Watson* v. *The Collector of Rajshahye* (1) dealing with the powers conferred by this section observes, at page 170, "There is a proceeding in these Courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected, because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit." The Court was in our opinion authorized in permitting the withdrawal by the plaintiffs of that portion of their claim which was concerned with any surplus of profits which might be found to be due to them. We are unable therefore to accede to Mr. *Ryves'* contention.

We now come to the last question discussed in the appeal. As we have shown, the Court below held that in any case the plaintiffs' suit is barred by 12 years' limitation under article 134 of the Limitation Act as regards the five villages held by the defendant Sri Rukmini and the defendants who are transferees of portions of these five villages from Sri Rukmini. On the death of the mortgagee Ata-ullah Khan, his widow, Sahib Begam, became entitled to the mortgaged property. She, in the year 1862, made a gift of it to Ali Husain, and he on the 7th of January

(1) (1869) 13 Moo., I. A., 160.

1867 mortgaged five of the twelve villages by way of conditional sale without possession to Prag Narain, who later on dedicated these five villages to Sri Rukmini. On the 13th of February 1871 Prag Narain took proceedings against Ali Husain for foreclosure of his mortgage, and in these proceedings treated Ali Husain as absolute proprietor. On the 19th of June 1872 a decree for foreclosure was passed, and on the 2nd of July 1872, according to the practice which then prevailed, a suit was brought for recovery of possession against Ali Husain and a decree was obtained therein, and on the 2nd of August 1872 Prag Narain obtained delivery of possession. These proceedings were taken behind the back of the original mortgagors, Ali Husain having been treated as sole and absolute proprietor. The Court below held that Prag Narain was a purchaser of the property within the meaning of that expression as used in article 134 of schedule II to the Limitation Act; and that the claim of Fateh Ali and his daughter was barred. On the part of the appellants Mr. *O'Conor* strenuously contended that article 134 did not apply to a case of an involuntary sale and that the foreclosure proceedings taken by Prag Narain did not constitute him a purchaser within the meaning of the article, and that if this be granted the defendants are forced to rely on the mortgage of 1867, and that inasmuch as that mortgage was a mortgage without possession the defendants do not come within the purview of the article. Mr. *O'Conor* quoted in support of his argument the case of *Ahamed Kutti* v. *Raman Nambudri* (1), in which it was held that a purchaser of immovable property at a sale in execution of a money decree in which the real interest of the judgment-debtor was that of a mortgagee only was not a purchaser from the mortgagee within the meaning of article 134, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. He also relied on the decision in *Ram Chandra* v. *Sheikh Mohidin* (2), in which it was held that a person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title, must have possession of the property for the statutory period in order to protect the transaction as against the original mortgagor under article 134.

(1) (1901) I. L. R., 25 Mad., 99. (2) (1899) I. L. R., 23 Bom., 614.

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It is clear from the mortgage of 1867 that Ali Husain held himself out to the mortgagee as absolute owner of the property therein comprised. In it, it is recited that the property is owned and possessed by him and that he is in proprietary possession of it. He purported to convey to the mortgagee an absolute interest in the property subject to redemption. It may be taken, we think, to be well settled law that a mortgage as well as an out and out sale by a trustee or a mortgagee is a purchase within the meaning of article 134. In *Bhagwan Sahai* v. *Bhagwan Din*, (1), Edge, C. J., and Tyrrell, J., held that article 134 was intended to protect a person who happening to purchase from a mortgagee had reasonable grounds for believing and did believe that his vendor had the power to convey and was conveying to him an absolute interest and not merely the interest of a mortgagee. In their judgment the learned Judges refer to the case of *Radanath Dass* v. *Gisborne and Co.* (2) in which their Lordships of the Privy Council discussed the meaning of the word "purchaser" as used in section 5 of Act XIV of 1859, which closely corresponds with article 134 of schedule II to the Limitation Act of 1877, and point out that upon the true interpretation of their Lordships' language, a person who purchases from a mortgagee having reasonable grounds for believing and believing that his vendor had power to convey to him an absolute interest, and not merely the interest of a mortgagee, was a purchaser within the meaning of the article. In the case of *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (3) it was held by Sargent, C. J., and Candy, J., that the expression "purchaser for valuable consideration" in article 134 includes a mortgagee as well as a purchaser properly so called. In the case of *Behari Lal* v. *Muhammad Muttaki* (4), Aikman. J., expressed the view that the term "purchased" as used in article 134 could not be taken as including "mortgaged," but Banerji, J., in the same case expressed a contrary opinion. In the case of *Maluji* v. *Fakir Chand* (5) the same question was discussed, and it was held by Farran, C. J., and Fulton, J., following the decision in *Yesu* v. *Balkrishna* that mortgagees are purchasers for value within the meaning of article 134.

(1) (1886) I. L. R., 9 All., 97.
(2) (1869) 14 Moo., I. A., 1.
(3) (1891) I. L. R., 15 Bom., 655.
(4) (1898) I. L. R., 20 All., 482.
(5) (1896) I. L. R., 22 Bom., 225.

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In the case of *Manavikraman Ittan Thamburan* v. *Ammu* (1) it was held by White, C. J., and Shephard, J., Davies, J., dissenting, that a mortgagee whose mortgagor was merely a mortgagee of lands but who mortgaged as if he were complete owner, was a purchaser within the meaning of article 134, and having been in possession for 12 years, was entitled to the benefit of that article.

In the case of *Narayan Manjoya* v. *Shri Ramchandra Derasthan* (2) Jenkins, C. J., and Aston, J., held that a lease described as a "mulgeni lease" was a purchase *pro tanto* of the interest thereby assured within the meaning of article 134. Jenkins, C. J., who delivered the judgment of the Court, says:—"Here no doubt we have a mulgeni lease and not an absolute alienation, but in principle this involves no distinction, for even if article 134 be treated as the governing article, a mulgeni lease is a purchase *pro tanto* of the interest thereby assured."

We are supported by the foregoing authorities in the view which we take, namely, that a person who *bonâ fide* purchases from a mortgagee in possession what is represented to him and what he believes to be the absolute interest, is entitled to the protection afforded by article 134. In the case before us we find that Ali Husain held himself out as the absolute owner of the five villages which were mortgaged to Prag Narain and we have no reason to suspect that Prag Narain had any reason to doubt the representation which was made to him by his mortgagor. We find that Prag Narain obtained possession of the mortgaged property on the 2nd of August 1872, and that he and his successors in title have been in uninterrupted possession of it from that time to the present. The cases upon which Mr. *O'Conor* mainly relied do not bear out his argument. One of these, *Ramchandra* v. *Sheikh Mohidin* (3), which decided that a person purchasing or taking a mortgage from a mortgagee, believing that he is getting a good title, must have possession of the property for the statutory period, in order to validate the transaction as against the original mortgagor under article 134. This case decided that a purchaser from a mortgagee of what is represented to be the absolute estate,

(1) (1900) I. L. R., 24 Mad., 471. (2) (1903) I. L. R., 27 Bom., 373.
(3) (1899) I. L. R., 23 Bom., 614.

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must be a purchaser with possession so as to make the purchase valid as against the true owner, after 12 years' enjoyment.

This case is not applicable to the case before us, in view of the fact that Prag Narain, the mortgagee, obtained possession in the year 1872, and that he and his transferees have been in possession ever since that time. The other case on which he relied, namely *Ahamed Kutti* v. *Raman Nambudri* (1) also has no close application. In it, it was held that article 134 only applies to cases in which the mortgagee disposes of the property voluntarily and not to a purchase made at an auction sale in execution of a money decree, in which the interest of the judgment-debtor is only that of a mortgagee. The mortgage of 1867 made to Prag Narain was a voluntary transaction, under which no doubt possession was not directly obtained, but it was a voluntary sale *sub modo* by virtue of which the mortgagee by the aid of the Court afterwards obtained possession.

Possession is not referred to in article 134, but we are disposed to think that the article is applicable only to cases in which a purchaser, whether his purchase be absolute or merely *sub modo*, must obtain and hold possession for 12 years or upwards, in order that he may have the benefit of the article. If the purchaser is a purchaser from a trustee, the property cannot be followed into his hands, as it may be under section 10 of the Limitation Act, unless he have possession. So in the case of a purchase from a mortgagee, the mortgagor has no notice of the transaction unless it be with possession. Taking therefore the view of the article most favourable to the plaintiffs appellants, their contention fails, inasmuch as Prag Narain and his transferees have had possession since the year 1872.

For these reasons we hold as regards the five villages included in the mortgage of the 7th of January 1867, that the plaintiffs' claim to redeem them cannot be sustained.

In view of the conclusions at which we have arrived upon the several points raised before us in this appeal, we are prepared to give a decree to the plaintiffs for redemption of the seven villages included in the mortgage which did not pass to Prag Narain under his mortgage, upon payment of any sum which may be due, after

(1) (1900) I. L. R., 26 Mad., 99.

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taking an account by them to the mortgagees on foot of the mortgage of 1830, and to dismiss the suit as regards the other five villages. As no account, however, has been taken in the Court below, we cannot finally deal with his appeal, but must remand issues to that Court under the provisions of section 566 of the Code of Civil Procedure. The mortgagees have put it out of their power to deliver over possession of the five villages to the mortgagors on redemption. These villages are, under section 82 of the Transfer of Property Act, liable to contribute rateably to the debt. We must therefore ascertain what part of the principal debt of Rs. 19,500 is properly attributable to the seven villages in respect of which we propose to pass a decree for redemption. We therefore remand to the lower Court the following issues under the provisions of section 566:—

(1) What portion of the mortgage debt is rateably attributable to the seven villages which we hold the plaintiff is entitled to redeem, regard being had to the amount of any incumbrances to which the villages respectively were subject at the date of the mortgage?

(2) How much of the mortgage debt, if any, attributable to the seven villages remains unpaid to the mortgagees, after making allowance for the usufruct of the property by the mortgagees from the date of the mortgage?

We direct the Court below to take such relevant evidence as the parties respectively may tender. On return of the findings the parties will have the usual ten days for filing objections. We reserve the question of costs.

Issues remitted.

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April 17.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

LACHMAN SINGH AND OTHERS (PLAINTIFFS) *v.* MADHUDAN (DEFENDANT.)*

Act No. IV of 1882 (Transfer of Property Act), sections 92, 93—Usufructuary mortgage—Redemption—Form of decree in a suit for redemption.

An order declaring that the plaintiff's right to redeem shall be extinguished upon non-payment within the time limited by a decree for redemption

*Second Appeal No. 527 of 1906, from a decree of H. J. Hall, Esq., District Judge of Aligarh, dated the 31st of March 1906, confirming a decree of Maulvi Muhammad Shafi, Subordinate Judge of Aligarh, dated the 30th of April 1905.

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of the amount found to be due is not a proper order when the mortgage sought to be redeemed is a usufructuary mortgage Nevertheless where such an order has been made and the decretal money has not been paid within the time limited and the decree has been allowed to become final, the plaintiff cannot thereafter bring a second suit for redemption *Sita Ram* v. *Madho Lal* (1) referred to.

THIS was a suit for redemption of a usufructuary mortgage, which was brought under the following circumstances. On the 20th of May 1901 the mortgagors obtained a decree for redemption of the mortgaged property subject to the payment of Rs. 2,555 within three months. The decree directed that if the amount found to be due was not paid within the prescribed time, the plaintiffs' right to redeem would be extinguished. This amount was paid within the time limited, and the plaintiffs obtained possession of the property, the subject of the suit. Subsequently the decree was modified in appeal, and a sum of Rs. 3,160-10-0 was found to be due by the mortgagees instead of Rs. 2,555. The additional amount thus decreed for redemption was not paid by the mortgagors, nor did they obtain any extension of the period prescribed for payment. The mortgagors withdrew from Court the sum of Rs. 2,555 which they had deposited in accordance with the decree as it originally stood, and brought a second suit for redemption. The Court of first instance (Subordinate Judge of Aligarh) held that the suit would not lie; and this decree was affirmed on appeal by the District Judge. The plaintiffs thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants.

Mr. *B. E. O'Conor* and Babu *Durga Charan Banerji*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit for redemption of a usufructuary mortgage of the 28th of July 1887. Both the lower Courts dismissed the plaintiffs' claim. The mortgagors were Musammat Parbati and Musammat Khem Kunwar, and the mortgagee is the defendant respondent Madsudan. On the 20th of May 1901, the mortgagors obtained a decree for redemption of the mortgaged property subject to the payment within three months of a sum of Rs. 2,555. The

(1) (1901) I. L. R. 24 All. 44.

decree directed that if the amount found to be due was not paid within the time prescribed, the plaintiffs' right to redemption would be extinguished. The amount due was paid within the three months and possession of the property was restored to the mortgagors; but on appeal the decree of the Court below was modified, it being found that a sum of Rs. 3,160-10-0, and not merely Rs. 2,555, was due on foot of the mortgage. This sum was ordered to be paid on or before the 5th of March 1902, and in all other respects the decree of the 20th of May 1901 was upheld. The mortgagors failed to pay the amount so directed to be paid and did not obtain any extension of time for payment. In consequence of this the mortgagees applied for and obtained an order for recovery of possession of the mortgaged property. The sum of Rs. 2,555 which had been deposited in Court was withdrawn by the mortgagors. The suit out of which this appeal has arisen was then brought on the 10th of February 1905 for redemption. It is met by the plea that it is not maintainable in view of the fact that by the decree of the 20th of May 1901, as also of the later decree affirming it, the right of redemption became extinguished on the expiration of the time allowed for payment of the mortgage-debt and failure by the plaintiffs to redeem before the time. Both the lower Courts yielded to the plea and, we think, rightly so. We are satisfied, in view of the provisions of sections 92 and 93 of the Transfer of Property Act, that the Court ought not to have passed an order declaring that the plaintiffs' right to redeem should be extinguished if the mortgage debt was not satisfied within the period fixed by the decree. It is manifest from section 92 that such an order can only be passed in the case of mortgages other than simple or usufructuary mortgages. The mortgage here was usufructuary. Section 93 provides that the defendant in a suit for redemption in case the mortgagor has failed to pay the amount ordered to be paid, may apply to the Court for foreclosure of the mortgagor's right to redeem in all cases other than the case of simple or usufructuary mortgage, and, unless the mortgage is by conditional sale, for an order that the mortgaged property be sold. The last paragraph but one of the section provides that on the passing of any order under the section the plaintiff's right to redeem and the security

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shall both be extinguished. It is clear, we think, from the language of this section that in the case of a usufructuary mortgage the proper and necessary order for a mortgagee to obtain, if the right of redemption is to be extinguished, is an order for sale. Such an order the mortgagees in this case did not obtain. There was, however, in the decree of the 20th May 1901, a direction that in default of payment of the mortgage debt within the time therein specified the mortgagors' right to redeem would be extinguished. To this order no exception was taken by the mortgagors. They acquiesced in the decree, and the decree has now become final. In view of this we must hold that the plaintiffs were not entitled to succeed in a second suit for redemption even though the order passed in the former suit was not in accordance with law. We are supported in this view by the judgments of our brothers, Banerji and Aikman, in the case of *Sita Ram* v. *Madho Lal* (1). The case may be a hard one on the plaintiffs, but they have themselves to blame in not taking exception to the form of the decree passed in the former suit. We dismiss the appeal with costs.

Appeal dismissed.

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April 18.

Before Mr. Justice Richards.

BADAM AND OTHERS (DEFENDANTS) v. GANGA DEI (PLAINTIFFS).*

Land-holder and tenant—Trees—Land-holder's and tenant's rights as to trees on tenant's holding.

Held that in the absence of special agreement a tenant has, as against his landlord, a right to insist that so long as his tenancy continues the landlord shall not cut down trees standing on the tenant's holding *Deolnandan* v. *Dhian Singh* (2), *Kaunsha* v. *Gulab Kunwar* (3) and *Buttonji Bahuji Shet* v. *The Collector of Thana* (4) referred to.

THIS was a suit brought by a zamindar claiming an injunction to restrain the defendant from interfering with her right to cut down and remove certain trees growing on the holdings of the defendants. The plaintiff claimed by virtue of her general rights as zamindar, but did not plead any particular contract or custom authorizing her to cut trees growing on a tenant's holding. The

* Second Appeal No. 684 of 1905, from a decree of Austin Kendall, Esq., Additional District Judge of Meerut, dated the 15th of April 1905, confirming a decree of Babu Ram Chander Chaudhari, Additional Munsif of Meerut, dated the 24th of January 1905.

(1) (1901) I. L. R., 24 All., 11.
(2) (1886) I. L. R., 8 All., 467.
(3) (1899) I. L. R., 21 All., 207.
(4) (1867) 11 Moo., I. A., 295.

defendants, on the other hand, while admitting the plaintiff's proprietary title to the trees, maintained that during the subsistence of their tenancy the plaintiff had no right to remove them. The Court of first instance (Additional Munsif of Meerut) decreed the plaintiff's claim, and this decree was on appeal affirmed by the Additional District Judge. The defendants appealed to the High Court.

Mr. *R. Malcomson*, for the appellants.

Babu *Durga Charan Banerji* (for whom Pandit *M. L. Sandal*), for the respondent.

RICHARDS, J.—So far as the present appeal is concerned the only claim I have to deal with is the claim of Ganga Dei to an injunction to restrain the defendants from interfering with her cutting down and removing certain trees growing on the holdings of the defendants. Both sides have expressly stated that this is the only question in the present appeal. Ganga Dei is the zamindar. The defendants are tenants either occupancy or non-occupancy. The plaintiff has given no special evidence from which the existence of a custom or contract enabling her to enter the holdings and cut down and remove the trees can be inferred. On the other hand the defendants have failed to establish any proprietary right in the trees. The learned advocate for the defendants has argued the case on their behalf on the basis that, admitting the property in the trees to belong to the plaintiff, and admitting that the defendants have no right to cut down and remove the timber, nevertheless the plaintiff has not, during the continuance of the tenancy, any right to enter and cut down the trees. There is no evidence that the trees were planted by the tenants or that they are fruit-bearing trees. Mr. *Malcomson* states on his instructions that in the case of one of the tenants the trees shelter his well. He gives this as illustrating that even in an agricultural holding a tenant may have strong interest in the maintenance of growing trees. He cites in support of his contention the case of *Dookinandan* v. *Dhian Singh* (1). In that case the plaintiff sued to recover possession of certain zamindari property. The defendant was in possession of certain plots, part of the land the subject matter of the suit, as proprietary tenant.

(1) (1886) I. L. R., 8 All., 467.

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On these plots there were certain fruit and other trees, and it was held by Straight and Mahmood, JJ., that the defendant was entitled to the trees on the land. It is not quite clear whether the learned Judges intended to decide that the defendant (the tenant) could cut down, sell or remove the trees, but it is quite clear that the learned Judges were of opinion that the zamindar had no right to cut trees during the continuance of the tenancy, and it is not necessary for the purposes of the present appeal for me to decide anything more than that the plaintiff is not entitled to cut, sell or remove the trees growing on the holdings of the defendants. The only decision cited on the other side is the case of *Kausalia* v. *Gulab Kunwar* (1). In that case Sir Arthur Strachey, Chief Justice, and Knox, J., held that the property in the trees growing on a tenant's holding is by the general law vested in the zamindar and that in the absence of special custom the tenant is not entitled to cut down trees. This case does not decide that in the absence of custom or contract the zamindar will have a right to cut and sell the trees growing on a tenant's holding during the continuance of the tenancy. The case of *Ruttonji Edulji Shet* v. *The Collector of Thana* (2) was also referred to That was a case in which a lessee from the Government sought damages against Government for preventing him from cutting forest trees for sale. The passage relied on is at p. 313 of the report and is in the following words:—"At the time, then, that this lease was made the whole of the land and all the rights connected with the land, subject to such claims as third parties might have upon it, belonged to the Government. The trees upon the land were part of the land and the right to cut down and sell those trees was incident to the proprietorship of the land." This again is no authority that the landlord is always entitled after he has made a letting to cut down trees, even though property in trees still remains in him Mr. Justice Mahmood in his judgment in the first case referred to was dealing with an expropriatary tenant, but the nature of the interest of an expropriatary tenant differs only from the nature of the interest of an occupancy tenant by reason of the fact that an expropriatary tenant is entitled to occupy the land at a lower rate. The principle of the

(1) (1899) I. L. R., 21 All., 287. (2) (1867) 11 Moo., I. A., 295.

judgment seems also to apply to the case of a tenant, who is either an occupancy tenant or an exproprietary tenant. But of course the zamindar in the case of a tenant who has no such "occupancy rights" will probably be able to carry out his wish with regard to the timber by bringing the tenancy to an end. I leave the decree appealed from undisturbed as regards the trees actually cut. I allow the appeal, set aside the decrees of both the Courts below so far as it grants an injunction to the plaintiff restraining the defendants from offering obstruction to the plaintiff in cutting down, removing and selling the trees (other than the trees actually cut). I do not intend and do not decide that the defendants have any right in the trees save the right to insist that during the continuance of the tenancy they shall not be cut down and removed by the plaintiff. The defendants will have their costs in all the Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1907. *April*, 23.

GOBIND KRISHNA NARAIN AND ANOTHER (PLAINTIFFS) v. KHUNNI LAL (DEFENDANT)*

Hindu Law—Change of religion—Effect of conversion of a member of a joint Hindu family to Muhammadanism—Regulation No. VII of 1832, s. 9—Compromise—Effect of compromise entered into by a Hindu female with a limited estate.

Held that Regulation No. VII of 1832 did not abrogate the Hindu law as to the consequences of apostacy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce those consequences. Where, therefore, in a joint Hindu family consisting of a father and one son the father was converted to Muhammadanism in the year 1856, the immediate effect of such conversion was to make the son sole owner of the property which up to that time had belonged jointly to him and his father.

Held also that a compromise made by a person holding a Hindu widow's or Hindu daughter's estate in the property of her deceased husband or father, is not binding on the reversioners, even though it has been followed by a decree of Court, not is a decree on an arbitration award, one of the parties to the submission having been a Hindu widow or daughter; but the reversioners can only be bound by a decree made after full contest in a *bond fide* litigation.

* First Appeal No. 135 of 1905, from a decree of Pandit Pitambar Joshi, Subordinate Judge of Bareilly, dated the 20th of May 1905.

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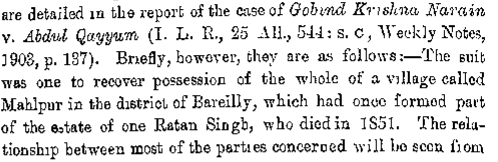
GOBIND KRISHNA NARAIN v. KHUNNI LAL.

Imrit Konwur v. *Roop Narain Singh* (1), *Sheo Narain Singh* v. *Khurga Koorry* (2), *Jeram Laljee* v. *Veerbai* (3), *Sant Kumar* v. *Deo Saran* (4), *Ram Saroop* v. *Ram Dei* (5) and *Stapilton* v. *Stapilton* (6) referred to.

The facts upon which the present suit and appeal are based are detailed in the report of the case of *Govind Krishna Narain* v. *Abdul Qayyum* (I. L. R., 25 All., 544: s. c, Weekly Notes, 1903, p. 137). Briefly, however, they are as follows:—The suit was one to recover possession of the whole of a village called Mahlpur in the district of Bareilly, which had once formed part of the estate of one Ratan Singh, who died in 1851. The relationship between most of the parties concerned will be seen from the following pedigree:—


RATAN SINGH = RAJ KUNWAR.
(Became a Muhammadan in 1845: ob. 14th September 1851).
(ob. November, 1858).
Daulat Singh = Sen Kunwar.
(ob. January 8th, 1851)
(ob November 9th, 1851)
A daughter (d s p.) = Rajjan Lal.
Jiwan Kunwar = Ram Prasad (predeceased her father).
Chattar Kunwar (d s p April 13th, 1866) = Awadh Behari Lal.
Mewa Kunwar (ob. 23rd March, 1899) = Aftab Rai.
Khairati Lal = Hulas Kunwar.
Gobind Krishna (plaintiff appellant).
Kashi Krishna (plaintiff appellant).

In 1845 Ratan Singh became a convert to Muhammadanism. Both father and son died in 1851, the son predeceasing the father. Sen Kunwar died in 1857, and Raj Kunwar in 1858. After the death of Raj Kunwar three claimants to the property of Ratan Singh (or Daulat Singh) arose, namely, Chhatar Kunwar, Mewa Kunwar and Khairati Lal, the son of a daughter of Ratan Singh. These claimants in 1860 settled their disputes by means of a compromise in virtue of which Chhatar Kunwar and Mewa Kunwar took 8 ½ annas of the estate and Khairati Lal 7 ½ annas. Chhatar Kunwar died in 1866 and her share (4 ½ annas) was taken possession of by Mewa Kunwar. Mewa Kunwar died in 1899. The present plaintiffs, sons of Mewa Kunwar, alleged that their

(1) (1880) 6 C. L. R., 76.
(2) (1882) 10 C. L. R., 337.
(3) (1903) 5 Bom., L. R., 885.
(4) (1886) I. L. R., 8 All., 305
(5) (1906) I. L. R., 29 All., 239.
(6) 1 White and Tudor, 230.

mother and aunt had no authority to enter into the compromise of 1860, so as to bind them, and that accordingly the share taken by Khairati Lal under that compromise could not have been held by him for a larger estate than that possessed by the two ladies, which had terminated in 1899 on the death of Mewa Kunwar. The village in suit had been transferred by Partab Singh as heir of Khairati Lal to the defendant Khunni Lal. The Court of first instance (Subordinate Judge of Bareilly) held that the compromise of 1860 was binding, not only on the parties to it, but also on the reversioners. It further held that the effect of Ratan Singh becoming a Muhammadan was to deprive him of only half the property, and that the moiety of which he still remained owner descended to Khairati Lal, his daughter's son. That Court therefore dismissed the plaintiffs' suit. From this decree the plaintiffs appealed to the High Court.

Sir *Walter Colvin*, the Hon'ble Pandit *Sundar Lal*, Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Dr. *Satish Chandra Banerji*, for the appellants.

Mr. *B. E. O'Conor* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This case is a sequel in some respects to the case of the same plaintiffs appellants *vs.* Abdul Qayyum decided by this Bench in April 1903, which will be found reported at I. L. R., 25 All., 546. In that case the plaintiffs sued to set aside an alienation made by their mother Rani Mewa Kunwar to her father-in-law under circumstances detailed fully in that judgment. We held in it that the plaintiffs were entitled to succeed. In that case we also detailed at length (pp. 553 *et seqq* of the report) the conflicting claims made by Rani Chhatar Kunwar and her sister Rani Mewa Kunwar on one side, and Raja Khairati Lal on the other to the estate of Raja Ratan Singh, who after his conversion was known by a Muhammadan name. The judgment then sets forth the compromise (p. 577 of the report) made between the opposing claimants, how the sisters took 8½ annas between them, while Khairati Lal got 7½ annas of the disputed estate. In that suit the villages which the plaintiffs sought to recover were situated within the 8½ annas which the sisters took under the compromise.

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The present suit is for recovery of possession of mauza Mahlpur, a village situate in the 7 ½ annas which Khairati Lal took under the compromise.

The ground on which the suit is supported is that the two sisters being only limited owners and as such entitled only to an estate for life had no authority to alienate more than their life estate unless for a purpose recognized as legal and necessary by Hindu law, and that as both are now dead, the compromise is not binding on their reversioners the plaintiffs appellants, who claim, not through their mother Rani Mewa Kunwar, but as next reversioners to their grandfather Daulat Singh, son of Ratan Singh.

Of the many matters mooted in the Court below the learned Subordinate Judge found in favour of the plaintiffs appellants on most points, but on the 7th issue, the vitally important question in the case, he was "of opinion that the compromise in question is not an alienation that would hold good for the lifetime of Musammat Chhatar Kunwar and Musammat Mewa Kunwar only, but is a family arrangement and is binding on the plaintiffs. The argument that as Hindu females they were incompetent to make a compromise that would have the effect of permanently alienating part of the property, is based on the assumption that all the property which was then the subject of the compromise was the exclusive property of their father Daulat Singh and they held a life estate in it, and that if there were no compromise the whole of it would have come to the present plaintiffs. The assumption is wrong."

Subsequently the learned Subordinate Judge considers the effect of the Regulation VII of 1832 and of Act No. XXI of 1850, and holds that Raja Ratan Singh was after his apostacy the absolute owner of one-half the estate which up to that time he had owned jointly with his son Daulati, and that on his death it descended to his grandson Khairati Lal, son of his daughter Jiwan Kunwar, from whom under various alienations the village in suit has devolved on the defendant respondent.

In the opinion expressed as to this matter by the learned Subordinate Judge we are unable to concur. In our judgment in the previous case we (at pp. 570 *et seqq* of the report) fully discussed

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the meaning and effect of Regulation No. VII of 1832, and held that it did not abrogate the Hindu law as to the consequences of apostacy, but merely laid down for the guidance of the Judge a rule under which he might refuse to enforce these consequences. But it does not purport to affect the substantive law. The Hindu law remained unaltered in this respect, and we hold that under it Daulat became on his father's conversion sole owner of the property which up to that time had belonged jointly to him and his father. We have not heard anything from the learned advocate for the respondent which causes us in any way to alter or modify our opinion as to the consequences which ensued on Ratan Singh's apostacy. It follows therefore in our opinion that on the death of Daulat Singh in 1851, his widow Rani Son Kunwar succeeded to a widow's estate in his property and on her death in 1857, his two daughters, Chhator Kunwar and Mewa Kunwar, succeeded to the limited interest of a female heir in the estate. That estate they held at the time of the compromise of July 1860. It was contended that at one place in our judgment we had held that Daulat Singh took only one-half of the estate. The reference is to page 573 of the report, where we say, when discussing the effect of a severance on the joint Hindu family: "Consequently if section 9 of this Regulation No. VII of 1832 had the effect for which the learned advocate for the respondent contends, it follows that on his father's conversion and on the separation resulting therefrom, the joint family being dissolved, Daulat Singh became the sole and absolute owner of *at least* one-half of the joint family property, in which his interest while still joint was one-half." But as we had already held that the Regulation had *not* the effect for which the learned advocate contended, and had held that on his father's conversion Daulat had become sole owner of the property which up to then had been their joint property, we are unable to understand how, in the passage just cited, we should be understood to hold that Daulat took only one-half. We held no more than that in a certain event, which in our opinion had not happened, Daulat would have taken at least one-half. As to the argument which the learned advocate for the respondent sought to draw from Act No. XXI of 1850, we consider it as sufficient to say that, as in our opinion Daulat

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Singh in 1845 had become sole and absolute owner of the whole of the estate which up to then had been the joint estate of himself and of his father, and as the Act just mentioned was not passed till 1850, some five years after Ratan Singh's conversion, it had no effect.

We hold, therefore, that when the compromise was entered into between the sisters and Khairati Lal the former were owners, though probably ignorant of their true position, of the whole estate which had been of Ratan Singh at the time of his apostacy. Their position was that of limited owners entitled to an estate for life. The question now remaining for decision is—had they, as such limited owners, power to enter into a compromise by which their reversioners would be bound? The compromise by which they, or rather their guardians, for they then were minors, permitted Khairati Lal to take nearly one-half of the estate undoubtedly amounts to an alienation. The circumstances under which that compromise came into existence will be found on page 558 of the report of the case already referred to. There can be no doubt that it was a just and wise compromise, each party having a good fighting title, and was perhaps the best arrangement which could have been made. Had the parties on both sides been male heirs, it unquestionably would have bound them and their successors and reversioners. But unfortunately one party were female heirs with a limited interest. Does their act bind their reversioners? We regret to be obliged to hold that in our opinion the reversioners are not bound by it.

In the case of *Imrit Konwur* v. *Roop Narain Singh* (1) their Lordships of the Privy Council lay down in clear and unequivocal language that "it is clear that the daughters could not be bound by a compromise made by the widow under any circumstances."

That case, no doubt, was one in which the widow when entering into the compromise had made good terms for herself disregarding the daughters' (her reversioners') interests. But the language used by their Lordships is general, and not confined to the facts of the case before them. It uses the words "under any circumstances" thus laying down a general rule that a widow

(1) (1880) 6 C. L. R., 76, at p. 81.

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cannot bind her reversioners under any circumstances by a compromise. We take it to be undisputable that the law laid down in respect of widow applies equally to daughters, who, like her, are merely limited owners holding the estate for life.

In the case of *Sheo Narain Singh* v. *Khurga Koerry* (1) a widow sued two brothers of her deceased husband (who had got themselves recorded as owners in succession to him) for confirmation of her possession as her husband's heir. She succeeded in the first Court, but this decision was reversed on appeal. She then filed a special appeal to the Sadr Court, and while the appeal was pending there she entered into an ikrarnamah, or compromise, with the respondents by which they divided the property, each side taking a share. In a subsequent suit by reversioners after the widow's death calling in question the validity of the compromise, it was held by the Calcutta High Court citing the case of *Imrit Konwar* v. *Roop Narain Singh* (mentioned above) that the ikrarnamah could not be regarded as affecting the rights of those who claim to be entitled as reversioners on the expiration of the widow's life interest. The case of *Jeram Laljee* v. *Veerbai* (2) was one practically to enforce a decree passed on an award, one of the parties to the submission to the arbitration having been a widow. In that case the learned Judge held that "there is a distinction between a bare compromise out of Court and an award by arbitrators followed by a consent decree thereon. But I think that in the absence of authority to the contrary it would be unsafe to treat anything short of a decree *in a suit contested to the end* as coming within the ruling in the Shiva Ganga case." This case shows that even a decree passed on an arbitration award may not be binding on reversioners.

Among the reported cases cited in the case just mentioned was that of *Sant Kumar* v. *Deo Saran* (3), in which Mr. Justice Mahmood held that the rule in the Shiva Ganga case was limited to decrees fairly obtained against the widow in contested and *bonâ fide* litigation and would not apply to the compromise made in that case, which could hardly be regarded as standing on a higher

(1) (1882) 10 C. L. R., 337, at p. 342. (2) (1905) 5 Bom. L. R., 555.
(3) (1888) I. L. R., 8 All., 365.

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footing than an alienation by the widow. A similar rule was applied in *Ram Sarup* v. *Ram Dei* (1) where it was held that a decree passed against a widow on an award in a case where there had been no trial in Court and which was based on agreement between the parties is not binding on the reversioners. In that case it was also held that an act done by the widow by which she purported to convey to third parties out of the property inherited from her husband an absolute estate amounted to an alienation.

On a review of the authorities we hold that a compromise made by a widow is not binding on the reversioners, even though it has been followed by a decree of Court, nor is a decree on an arbitration award, one of the parties to the submission having been a widow, and that the reversioners can be bound only by decree made after full contest in a *bonâ fide* litigation. Mr. J. C. Ghose in his book on the Principles of Hindu Law, 2nd edition, page 267, writes :—"It has been held that a decree against a widow to bind the reversioners must have been passed after full contest, and a compromise decree or a decree on an arbitration award can have no higher footing than an alienation by the widow." But it was contended that the compromise might be defended as a "family settlement" of doubtful claims. That contention is, we think, not sound. This subject is discussed in the leading case of *Stapilton* v. *Stapilton* (2). In that case dealing with what a Court of Justice has to do in dealing with a compromise, we find the words "always supposing that it (*i.e.* the compromise) is within the power of each party if honestly done," indicating the qualification which each party to the compromise must possess. The two sisters being only limited owners, it, we think, was not "within their power" to enter into such a compromise so as to bind their reversioners.

Finally we would add that there is no pretence for suggesting, nor has any such suggestion been made, that the compromise of July 1860 was justifiable by any necessity recognized by Hindu law.

To sum up we are of opinion that the two sisters had no more power to enter into the compromise of July 1860 than a widow

(1) (1906) I. L. R., 29 All., 239. (2) 1 White and Tudor, 230.

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would have had. There not having been any litigation ending in a decree of Court passed after full contest, we are of opinion that in making that compromise the sisters exceeded their powers as limited owners, and that even if the compromise be regarded as a family settlement of doubtful claims, it was not within the sisters' power to enter into it so as to bind the reversioners. We, therefore, hold that the compromise is not binding on the plaintiffs.

For the above reasons we hold that the decree of the lower Court is wrong, and accordingly, reversing it, we allow this appeal and give a decree in favour of the plaintiffs appellants for recovery of possession of the village in suit. Appellants are entitled to their costs in both Courts. The objections filed under section 561 of the Code of Civil Procedure fall to the ground.

Appeal decreed.

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April 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt

MANOHAR LAL, (PLAINTIFF) *v.* BANARSI DAS AND OTHERS (DEFENDANTS).*

Jains—Adoption—Custom—Authority of widow to adopt—Adoption of married man.

Held that according to the law and custom prevailing amongst the Jain community (1) a widow has power to adopt a son to her deceased husband without special authority to that effect, and (2) a married man may lawfully be adopted

Maharaja Govind Nath Roy v. *Gulab Chand* (1), *Sheo Singh Rai* v. *Dakho* (2), *Lakhmi Chand* v. *Gatto Bai* (3), *Bhagwan Singh* v. *Bhagwan Singh* (4), *Raja Vyankatrao Anandrao Nimbalkar* v. *Jyavantrao* (5), *Nathaji Krishnaji* v. *Hari Jagoji* (6), *Sadashiv Moreshwar Ghate* v. *Hari Moreshwar Ghate* (7), *Lakshmappa* v. *Ramava* (8) and *Dharma Daga* v. *Ramkrishna Chimaji* (9) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the appellant.

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* First Appeal No 31 of 1906, from a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 7th of November 1903.

(1) (1833) 5 S. D. A., 276.
(2) (1878) I. L. R., 1 All., 688.
(3) (1886) I. L. R., 8 All., 319.
(4) (1895) I. L. R., 17 All., 294 and (1898) 21 All., 419.
(5) (1867) 4 Bom., H. C., Rep. A. C. J., 191.
(6) (1871) 8 Bom., H. C., Rep. A. C. J., 67.
(7) (1874) 11 Bom., H. C., Rep., 190.
(8) (1875) 12 Bom., H. C., Rep., 364.
(9) (1885) I. L. R., 10 Bom., 80.

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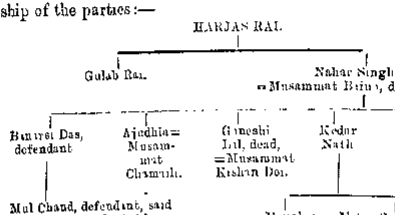
MANOHAR LAL v. BANARSI DAS.

The Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, Mr. *R Malcomson* and Pandit *Bhagwan Din Dube*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal arises out of a suit for partition of the property of a joint Hindu family, the plaintiff claiming to be entitled upon partition to one-third of the property. One fifth only was awarded to him and hence the appeal. The following genealogical tree will show the relationship of the parties:—


HARJAS RAI.
Gulab Rai.
Nahar Singh =Musammat Bilno, defendant.
Banarsi Das, defendant
Ajudhia = Musammat Chamuli.
Ganeshi Lal, dead, =Musammat Kishan Dei.
Kedar Nath
Bidri Das, defendant.
Mul Chand, defendant, said to have been adopted by Musammat Kishan Dei, widow of Ganeshi Lal, on 2nd November 1902
Manohar Lal, plaintiff
Mitra Sen, dead, =Musammat Sharbati, dead.

The main question in dispute is whether or not Mul Chand, the son of the defendant Banarsi Das, was validly adopted by his aunt Musammat Kishan Dei, the widow of Ganeshi Lal. Mul Chand at the time of his alleged adoption was a married man of the age of about 23 years. Manohar Lal disputes the fact of this adoption and also the validity of it.

When the appeal first came before this Court we found it necessary to remand an issue to the lower Court in regard to the validity of the adoption. A plea of adoption according to the law and custom prevailing among the Jain sect was set up by Mul Chand, but no issue was framed upon this plea. The only issue struck as to the alleged adoption was this, namely:—"Was Mul Chand adopted by Ganeshi Lal's widow for Ganeshi Lal and that in conformity with the desire of Ganeshi Lal?" We, therefore, referred the following issue for trial, namely:—"Is the adoption of a married man valid under the law and custom prevailing amongst the Jain community?" It is admitted that at the time of his adoption Mul Chand was a married man of the age

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of about 23 years and had a daughter. The learned Subordinate Judge had decided the issue in the negative, holding that the alleged custom whereby a married man can be adopted amongst the Jains was not established. The validity of such an adoption is the main question for determination in this appeal; but there are a number of other matters which have been raised in the grounds of appeal and also in the objections filed by the respondents under section 561 of the Code of Civil Procedure which will require our attention.

The Court below found that Musammat Kishan Dei did in fact adopt Mul Chand, but against its findings, as also on the question of the validity of the adoption, if it took place, the appellant has preferred grounds of appeal. On the question of law the learned advocate for the appellant contended that the Jains are dissenters from Hinduism, but that they are governed by Hindu law unless in matters in which a custom in conflict with that law is established; that a married man, or in fact a man of the age of Mul Chand at the time of his alleged adoption could not have been validly adopted, whatever be the class of Hindus to which he belonged. In support of the adoption, it was argued that adoption amongst the Jains is secular and not religious, that all religious motive is wanting, that the Jains do not believe in the Hindu doctrine of the efficacy of initiatory ceremonies or the doctrine of the second birth and have distinct rules as regards adoption; as for example, the rule which admits of the adoption of a daughter's son or sister's son, and that no reason existed for any restriction in the matter of age or by reason of marriage. At the outset it may be well to consider the origin and history of the Jain sect.

A good summary of their early history is to be found in Dr. Hoernle's Presidential Address to the Asiatic Society of Bengal in 1898. From it we glean that the founder of Jainism was Mahavira, who was born of a good Kshatriya family in or about the year 599 B. C., about 40 years before the birth of Buddha, who was a younger contemporary. Both Mahavira and Buddha were founders of what we should describe as monastic orders rather than religious sects. But the institution of monasticism was not a new innovation, seeing that it formed an

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essential feature of Brahmanism. Dr. Hoernle writes :—"The old Brahmanic religion ordained man's life to be spent in four consecutive stages called *aramas*. A man was to commence life as a religious student, then to proceed to be a house-holder, next to go into retirement as an anchorite, and finally to spend the declining years of his life as a wandering sanyasi, or mendicant." He further observes that "in course of time a tendency arose in Brahmanism to limit the entry into the stage of a mendicant to persons of the Brahmanic caste, and that it was probably this circumstance which first led to the formation of non-Brahmanic orders, such as those of the Buddhists and Jains, which were chiefly and originally intended for persons of the Kshatriya caste." Then he points out how dissent and opposition to the Brahmanic ascetics arose amongst the Jains and Buddhists, and adds :—"The Buddhists and Jains were not only allowed to discard the performance of religious ceremonies, which was also done by the Brahmanic mendicants, but to go further and even discontinue the reading of the Vedas. It was this latter practice which really forced them outside the pale of Brahmanism. The still very prevalent notion that Buddhism and Jainism were reformatory movements and that more specially they represented a revolt against the tyranny of caste is quite erroneous. They were only a protest against the caste exclusiveness of the Brahmanic ascetics; caste as such and as existing outside their orders was fully acknowledged by them. Even inside their orders admission, though professedly open to all, was practically limited to the higher class. It is also significant of the attitude of these orders to the Brahmanic institutions of the country that, though in spiritual matters their so-called lay-adherents were bound to their guidance, yet with regard to ceremonies, such as those of birth, marriage and death, they had to look for service to their old Brahmanic priests. The Buddhist or Jain monk functionated as the spiritual director to their respective lay communities. But the Brahmans were their priests." We further gather from Dr. Hoernle that early in the history of his order Mahavira adopted stringent notions on the subject of dress and discarding clothes wandered about as a naked mendicant. In consequence of this there was soon a division in the order and the sect became

divided into two divisions, namely, the *Cvetambaras* or the clothed members of the order and the *Digambaras*, the unclothed. The latter refused to acknowledge the collection of the sacred books of the order known as the *Purvas* and *Angas*. Referring to the question of caste Dr. Hoernle says :—"A lay convert to Jainism does not lose his caste by his conversion. He may have to give up the exercise of the trade of his caste, but if he wants a wife for himself or his son or a husband for his daughter, he can only get them from his own caste."

Mr. Golap Chandra Sarkar in his Tagore Lectures for 1888 remarked of the Jains :—"The Jains, like the Buddhists, do not admit the authority of the Hindu Shastras, but admit the caste system and the superiority of the Brahmans, who are the priests in their temples. And although Jainism differs in many respects from Hinduism, yet on the whole the Jainas may be called Hindu dissenters." Later on, dealing with the question of adoption amongst the Jains, he writes :—"The usage of adoption obtains amongst the Jainas, although they do not perform the Shraddas or believe in the Hindu doctrine of spiritual efficacy of sons : adoptions amongst them want the spiritual element and are entirely secular in character." Again he observes :—"They are governed by the Hindu law of adoption, except in the following particulars, in which it has been proved that their usages are different." He then points out that a Jain widow is competent to adopt a son without having obtained authority to do so from her husband, and further observes :—"An adoption among the Jainas being a temporal institution, the religious ground of objection against the adoption of an only son must necessarily fail; such adoption would therefore be valid unless the extinction of the natural father's lineage in a temporal point of view be admitted to vitiate it. The rule of prohibited relations for adoption does not obtain amongst the Jainas, who may therefore adopt a daughter's or sister's son. Nor is the restriction based on the age of the adoptee applicable to the Jainas, among whom the rule is that a person within the age of 32 may be adopted." Then the learned author directs attention to the fact that no religious ceremonies are necessary for a valid adoption amongst the Jains in view of the fact that they do not believe in the efficacy

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of rites prescribed by the Hindu Shastras. Then he says:—"The gift and acceptance of the person adopted are the only requisite ceremonies for a lawful adoption amongst them."

Mr. Barth in his work on the Religions of India (at page 143 of the third edition) observes that "the Jainas like the Buddhists, reject the Veda of the Brahmans, which they pronounce apocryphal and corrupt, and to which they oppose their own *Angas* as constituting the true Vedas. They are quite as little disposed to tolerate the existence of the sacrodotal caste, although at the present, the clergy in some of their communities at least are recruited from certain families in preference to others, and, it appears, from the Brahman caste itself. Besides, they observe the rules of caste among themselves as well as in their relations with others who dissent from them, but like several Hindu sects, however, without attaching any religious significance to it. Sir Monier Williams in his work on Modern India and Indians, 5th edition, page 159, says of the Jains that they "agree with the Buddhists in rejecting the Veda of the Brahmans."

Sir Guru Das Banerji in his work on the Hindu Law of Marriage remarks, at page 19:—"There are only three Indian sects of importance, the Buddhists, the Jains and the Sikhs, who have entirely repudiated Brahmanism, and who ought to be excluded from the category of Hindus, and judging from the language of certain enactments (*e.g.*, Act XVII of 1875, section 4, Act XXI of 1870) in which those three sects are mentioned as classes co-ordinate with the Hindus, it would follow that the Legislature intends such exclusion."

Treating of the law of adoption, Mr. Mayne observes that it has been successfully appropriated by the Brahmans, and that "in this instance they have almost succeeded in blotting out all trace of an usage existing previous to their own," and then he says:—"The inhabitants of the Punjab and the North-Western Provinces, whether Hindus proper, Jains, Jats, Sikhs or even Muhamamadans, practise adoption without religious rites or the slightest reference to religious purposes," and later on he writes:—"Little is to be found on the subject in the works of any but of the most modern writers, and the majority of the ancient authors rank the adopted son very low among the subsidiary sons.

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The series of elaborate rules which now limit the choice of a boy are all the offspring of a metaphor that he must be the reflection of a son. These rules may be appropriate enough to a system which requires the fiction of actual sonship for the proper performance of religious rites; but they have no bearing whatever upon affiliation which has not this object in view, and as we shall find they are disregarded in many parts of India where the practice of adoption is strongly rooted" (pages 8 and 9 of the 6th edition).

Apart from the religious aspect of the question there would appear to be no good reason why a married man should not be eligible for adoption. The respondents' case is that the Jains being emancipated from religious rules governing orthodox Hindus are in the matter of adoption relieved from the restrictions imposed by the Brahman priest from religious motives and that while retaining the practice of adoption they pay no heed to the restrictions imposed by the Brahmans. Nanda Pandita lays it down as an absolute rule that a child must not be adpoted whose age exceeds five years, or upon whom the ceremony of tonsure has been performed in the natural family (*Dattaka Mimansa*, section 4, para. 22). In doing so he relies upon a passage from the *Kalika Purana* which is of doubtful authenticity and which is treated as spurious by the author of the *Dattaka Chandrika*. According to the authority of the *Dattaka Chandrika* age is only material as determining the term at which the ceremony of investiture of the sacred thread may be performed, and so long as this rite in the case of the three higher classes, and marriage in the case of Sudras, can be performed in the family of the adopter, there is no limit of any particular time (*Dattaka Chandrika*, section 2, paras. 20—38) law.

Mr. *Sundar Lal* argued that the Hindu law permitted the adoption of a married man, provided that he belonged to the same gotra as the adoptive father, as is the case here; but that if it did not do so, there was a recognized and binding custom among the Jains whereby the adoption of married men is legal and that this custom is established by the evidence.

We may here mention that the number of Jains in this Province according to the last census is only 84,801, the total number

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in India being 1,334,148. According to the custom which is set up by the defendants respondents married men as well as unmarried boys are eligible for adoption, but in the majority of cases unmarried men would ordinarily be selected. We cannot, therefore, in the case of so small a community expect to find many instances of the adoption of married men. Few indeed would be the adoptions in the sect. We agree in the view taken by the Court below that the evidence amply proved the fact of adoption of Mul Chand. We have carefully considered the evidence adduced in support of this part of the case and we see no reason to distrust it. It is unnecessary, we think, to refer particularly to this evidence. So far, therefore, as regards the fact of the adoption we have no hesitation in affirming the decision of the Court below.

We come at once to the evidence adduced in support of the alleged custom amongst the Jains whereby it is permissible to adopt married boys or men. Evidence of such adoptions within the last forty years in Meerut, Muzaffarnagar, Saharanpur, in these Provinces and a few instances in Delhi, which formerly belonged to the North-Western Provinces, was given, namely 5 in Meerut, 11 in Muzaffarnagar, 7 in Saharanpur and 3 in Delhi. We shall first take the Meerut cases. The first is that of Mithan Lal. He deposed that Nand Lal adopted him 16 or 17 years ago, when he was a married man, and that he is in possession of Nand Lal's property. His natural father was Umrao Singh, a resident of Baraut. He stated that his natural father Umrao Singh celebrated his marriage when he was 14 years of age and that he was adopted when he was 16 years old. His evidence is corroborated by Munshi Lal, who was not present at the adoption but heard of it from the members of the brotherhood, and also by Jugul Kishore, a resident of Baraut, who stated that a married boy can be adopted by the Jains, and gave us illustrations of such adoptions, the cases of Hazari Lal and Mithan Lal and also of Anup Singh. The next instances are those of Sangam Lal and Sanai Lal which may be taken together. One Murlidhar deposed that he adopted Sangam Lal 18 or 20 years ago and that his marriage had taken place before the adoption. He also deposed to the adoption of Sanai Lal by his own brother Bansidhar after Sanai Lal's marriage

had taken place. In cross-examination he stated that Sangam Lal was 15 or 16 years old when he was adopted and that he (the witness) celebrated his second marriage after his adoption and after the death of his first wife. Bansidhar, he stated, adopted Sanai Lal, who was his sister's son, 32 years ago, and Sanai Lal was adopted two years after his first marriage. Bansidhar, the adoptive father of Sanai Lal, also gave evidence to the same effect. Wills executed by Bansidhar and Murlidhar respectively in favour of their adopted sons, and bearing date respectively the 14th of February 1900 and 24th of July 1901, were adduced in evidence showing that these adoptions were acknowledged before the institution of the present suit. The next case is that of Amman Singh. He was examined and deposed that Jaisukh adopted him after his marriage and that his wife is still alive; that Kallu Mal was his natural father and that Kallu Mal's property is in the possession of his brothers while he (the witness) is in possession of the property of Jaisukh.

The Court below held that the evidence of the adoption of Mithan Lal was not clear. The learned Subordinate Judge states that "Mithan Lal spoke of his being adopted by his mother's brother," but he is in error as to this. Mithan Lal did not say that he was adopted by his mother's brother but by his father's maternal uncle. Again, the Subordinate Judge makes this comment that Mithan Lal stated that he was in possession of his maternal uncle's estate but did not state that he was not in possession of his natural father's estate. The answer to this is that he was not asked whether or not he was in possession of his natural father's estate. Then of the case of Sangam Lal and Sanai Lal, the Subordinate Judge held that they were not satisfactorily proved, remarking that in both cases no particulars were given as to the parents of the girls to whom these adopted sons were married but no questions were put to them as to the parentage of the girls. The learned Judge might himself have inquired as to this if he considered the information a matter of importance. We see no reason for distrusting the evidence given in proof of the adoptions of Mithan Lal, Sangam Lal and Sanai Lal. We do not believe that the witnesses told deliberate falsehoods in regard to these adoptions and they were bound to know the true facts. As regards

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Amman Singh, the learned Subordinate Judge accepted the proof of his adoption after marriage as being free from suspicion, though he thinks that the fact that Amman Singh was unable to mention any other instances of similar adoptions, deprived his case of any "great weight."

We now come to the Saharanpur cases. The first is the case of Sikri Prasad. He keeps a draper's shop and is also a "contractor." He deposed that he is the adopted son of Mithan Lal, his own father Murlidhar having been brother of Mithan Lal. He says that he was adopted 18 or 19 years ago, that his first wife was Bhim Singh's daughter, and his second wife is Nehal Chand's daughter. His marriage, he said, had taken place when his paternal uncle adopted him. It was customary, he said, amongst the Jains to adopt a boy after marriage, and he gave two other instances of such adoptions, namely, those of Jhambu Das, who was adopted by Musammat Asharfi, and Dip Chand, who was adopted by Musammat Gumti Kunwar. In cross-examination he stated that he was 19 or 20 years old when he was adopted, and that his marriage had taken place 8 or 9 years before when he was 11 years of age. A witness for the plaintiff, Munshi Govind Rai, whilst admitting that Sikri Prasad was adopted by Mithan Lal, alleged that he was unmarried at the time of his adoption. It is apparent, however, from his cross-examination that he had no personal knowledge of the facts. He was not present at the adoption ceremony and did not remember the year in which the adoption took place. He could not even say whether or not Sikri Prasad was married twice. We have no hesitation in accepting the evidence of Sikri Prasad, given as it was with so much detail. There appears to us no reason for discrediting it. We are unable to appreciate the reasons given by the learned Subordinate Judge for his rejection of the evidence of this witness.

We next come to the cases of Chhotu Mal, Prabhu Lal and Naurangi Mal. Chhotu Mal was examined and deposed that Ganesh Lal adopted him after his first marriage, which was celebrated by his natural father Surjan Lal; that Ganeshi Lal was his paternal uncle and celebrated his second marriage after the death of his first wife. In his examination-in-chief this witness stated that his marriage took place after his adoption,

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but immediately corrected himself and stated that his first marriage took place before his adoption, and that it was his second marriage to which he had at first referred. The learned Subordinate Judge was of opinion that the first statement was true and rejected his evidence. We do not agree with the learned Subordinate Judge. We think that when in the first instance the witness referred to his marriage as having taken place after his adoption, he referred to his second marriage. Sangam Lal deposed that Jains adopted married boys, that he had not merely heard this from his elders but that married boys were adopted to his own knowledge. As instances he mentioned the case of Chhotu Mal, also of Prabhu Lal, who was adopted, he said, by Shibba Mal, and Naurangi Mal, who was adopted by Shibba Mal's wife. He was present, he stated, at the adoption of these three persons, and they were all adopted after their marriages had taken place. In cross-examination he stated that Chhotu Mal's first marriage took place about 30 years ago, that his marriage procession went to Talsara and that he was 14 or 15 years old at the time of his marriage, and that his wife died four or five years thereafter. He stated that Chhajjan Mal was the father of Chhotu Mal and that he was adopted five or six years after his first marriage. The learned Subordinate Judge accepted the evidence of this witness in the case of Prabhu Lal, but rejected it in the case of Naurangi Mal, saying that no particulars as to the parentage and home of his first wife were given and that therefore he thought this marriage was a myth. As a matter of fact the home of his first wife is mentioned, as it is stated that his marriage procession went to Talsara. We see no good reason for rejecting this evidence.

The next two instances are those of Ajit Prasad and Janki Singh. Duli Chand, a resident of their village, deposed that it was valid amongst the Jains to adopt a married boy, and as illustration of such adoptions he mentioned the case of Ajit Prasad who was adopted by Gurdayal Singh, and of Janki Singh by Musammat Mulo, the widow of Chhajju Singh. He stated that he attended at the adoption ceremonies of these two persons. The learned Subordinate Judge accepted his evidence in the case of Janki Singh, but refused to accept it in the case of Ajit

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Prasad. In the latter case he improperly referred to and relied on a judgment delivered by the Subordinate Judge of Saharanpur in another case, which was not admissible in evidence, and said that it appeared from this judgment that Ajit Prasad had after his alleged adoption given out in Court, referring to his parentage, the name of his natural father. We do not think that the learned Subordinate Judge ought to have referred to a judgment which was not in evidence in the case before him; and in any case the learned Subordinate Judge was wrong, we think, in attaching so much importance to the mention of his natural father's name, which may have been accidental.

The last of the Saharanpur cases is that of Nidha Mal. His adoption after his marriage was proved by Hardhian Singh, who stated that his (witnesses') mother-in-law adopted Nidha Mal in Deoband, 30 or 32 years ago. Nidha Mal's marriage, he said, took place before his adoption and his wife died two years after his adoption. A married boy, he said, can be adopted by Jains.

We now come to the Muzaffarnagar instances. The adoption of Piare Lal after his marriage by Sik Chand is deposed to by his natural father Sangam Lal, a shopkeeper in the village of Khatauli. Sangam Lal deposed that he gave his son Piare Lal in adoption to Sik Chand 25 or 26 years ago; that he had him married 27 or 28 years ago, and that Piare Lal is in possession of Sik Chand's property. This witness also deposed to the adoption of Bul Chand and Makund Lal. Bul Chand was adopted, he said, by Bahal Singh, and Makund Lal by Banarsi Das, both residents of Khatauli. These two adopted sons, he said, were then in possession of the property of their adoptive fathers. In cross-examination he gave particulars as to the adoptions of Bul Chand and Makund Lal, saying: — "I went over when Bul Chand and Makund Lal were adopted. Bul Chand was given in adoption by the *Sardhanawali*. I do not know her name. She was Bahal Singh's sister. Bul Chand was a resident of Daghat. I do not know his father's name. He was adopted by the *Daghatwali*. The *Daghatwali* took him in adoption from Makhu Mal. When Makhu Mal died, his wife gave Bul Chand in adoption, after his marriage, to Bahal Singh." Later on he stated that the name of Makund Lal's natural father was Bansi

Lal. Kallu Mal, a witness for the plaintiff, corroborated the last witness as regards the adoption of Piare Lal, but said that the adoption preceded his marriage and that Piare Lal was not married before his adoption. As regards Bal Chand, he said that he was adopted by some one at Sardhana but did not know by whom. In cross-examination he admitted that he was not present at the adoption of Piare Lal and he was unable to say how many years ago the adoption had taken place. He evidently has no personal knowledge of the matter. The learned Subordinate Judge did not consider that sufficient proof of these instances was given; but we are unable to agree with him in this.

The next instance is that of Gyan Chand. His adoption is deposed to by Umrao Singh, who deposed that adoption after marriage is customary amongst the Jains and that he himself was adopted by Jamna Das, 20 or 21 years ago, after his first marriage. His first wife having died, he married, he said, a second wife 11 or 12 years ago. The property of Jamna Das is in his possession, while the property of his own father Lachman Das is in his brother's possession. The adoption of Ranji Ram is deposed to by himself. He stated that he was Fakir Chand's son and that Fakir Chand had him married when he was 14 or 15 years old and afterwards gave him in adoption to Shadi Ram, whose property he got. In cross-examination he stated that his adoption took place about four years after his marriage. The learned Subordinate Judge rejected this evidence owing to the statement of the witness that he was adopted eight or nine years after the Mutiny and that during the Mutiny he was one or two years old and therefore his marriage must have taken place when he was only a child of five years. We cannot appreciate the reason so assigned for rejecting his evidence. A mistake in the matter of dates is readily made. Allowance must, we think, be made for defects of memory which in such matters are inevitable after the lapse of so many years. Munshi Lal deposed to his own adoption and also to that of Chitra Mal. This witness is a zamindar. He stated that he was adopted by his aunt, the wife of Buddhu Mal, 16 or 17 years ago, that he was married to a member of Kallu Mal's family in Pur 18 or 19 years ago, and that his own father Chandan Mal gave him in adoption. He also

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mentioned the adoption of Mithan Lal by Kundan Lal, 13 or 14 years ago, after his marriage had taken place, and also the adoption of Chitra Mal in Soran, four years ago, by Shadi Mal. In cross-examination he stated that he was not present at the adoption of Mithan Lal, but heard of it from the members of the brotherhood. The adoption of Banwari Lal by Bansi Lal is proved by Jai Dayal. Jai Dayal is a zamindar, paying Rs. 2,500 per annum as revenue and Rs. 35 as income tax. He deposed that a married boy is adopted amongst the Jains and that his father's own brother adopted his nephew Banwari Lal who was then a married man. This adoption is supported by a *khewat* on the record of mauza Tavli for the year 1296 *Fasli*, in which Banwari Lal is mentioned as the adopted son of Bansi Lal. The last of the Muzaffarnagar cases is that of Piaro Lal, the adopted son of Har Chand Rai. He deposed that it was customary amongst the Jains to adopt a son after marriage, and that he was adopted by Har Chand Rai after his marriage, about 22 or 23 years ago. Har Chand's property consisting of hypothecation bonds of the value of two to four thousand rupees was, he said, in his possession. With the exception of the case of Chitra Mal, the Subordinate Judge did not accept the evidence as satisfactorily establishing the adoption after marriage in the instances to which we have last referred. We are unable to agree with him in his estimate of the evidence. We cannot ascribe to the witnesses the wholesale perjury which the rejection of their evidence implies.

Evidence was also given in support of the adoptions after marriage, in Delhi, of three persons, namely, Samman Singh, Umrao Singh and Juggi Mal. Umrao Singh deposed that he was adopted by Karnali Mal, his natural father's name being Kure Mal. He stated that his first marriage took place about 19 years ago, his second 14 years ago, and third seven or eight years ago, and that Musammat Patho, wife of Karnali Mal, adopted him a few years after his first marriage had taken place. He further deposed that the property of his own father Kure Mal was in the possession of his brother Sultan Singh and that Karnali Mal's property was in his possession. "Among us," he said, "a boy can be adopted after his marriage. It is a Jain custom." In cross-examination he stated that his own father had instituted a

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suit in respect of Karnali Mal's outstandings, but that he was not aware whether he had done so on his (the witnesses') behalf or on behalf of Musammat Patho. Jawahir Mal, a cashier in the National Bank at Delhi, deposed that he was a *panch* of the Jain Agarwal brotherhood of Delhi and that it was not customary to adopt a boy whose marriage had taken place: but he admitted in cross-examination that Lala Mohar Chand adopted Juggi Mal after his marriage and celebrated Juggi Mal's second marriage after adopting him. Referring to Lala Mohar Chand the witness said:—"He is a great and good man." Asked as to what the objection of the brotherhood was to the adoption of Juggi Mal, he stated:—"The members of the brotherhood had only this objection to Juggi Mal's adoption. Juggi Mal was of advanced age and Mohar Chand's wife was young. There was no other objection." It thus appears that the whole objection to Juggi Mal's adoption was not that he was a married man, but that he was older than his adoptive mother. Another witness, Kanhai Lal, also proved the adoption of Juggi Mal, and he stated that all the members of the brotherhood attended Juggi Mal's second marriage which took place after his adoption. It is clear from the evidence of these witnesses that Juggi Mal was adopted although he had been previously married.

A number of witnesses were examined on behalf of the appellants who deposed that it was not customary amongst the Jains to adopt a married boy. Amongst these are Khairati Ram, Mitter Sen, Kabul Singh and Nihal Singh, Mangal Sen, Lakhpat Rai and Tota Ram as also Munshi Lal to whose evidence we have already referred. These witnesses simply say that amongst the Jains a married boy is not adopted, that the custom is to adopt unmarried boys. It is apparent that their views were based on the fact that they had no knowledge of the adoption of married boys. We have not the slightest doubt that married boys were and are adopted, and that the evidence in support of these adoptions is truthful. If it be, we have 23 cases established, namely, nine in Muzaffarnagar, seven in Saharanpur, three in Delhi and four in Meerut. Considering that the Jain population is not large and is scattered about, and that ordinarily unmarried boys would be selected for adoption, the number of cases of the

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adoption of married youths or boys which has been proved, is striking.

Does this evidence satisfactorily establish the alleged custom? It is to be borne in mind that the Jains are mostly engaged as traders and shopkeepers. They are not landowners, and therefore we cannot expect to find any records of adoptions such as are to be met with in conveyances and transfers of land, or in *khewats* and other land records. Even if any such documents were forthcoming they would not show whether the adoptees were married or single. Proof by instances is the only class of proof which they could ordinarily adduce, and this is the proof which we are asked to accept.

It is admitted on the part of the plaintiff appellant that Jains can adopt a boy at any age, provided that he be not married; that the ceremonies of tonsure and investiture with the sacred thread not being observed by the Jain community, the rule of Hindu law, which prohibits the adoption of a boy after the performance of the ceremonies, does not pervail; but it is said that marriage is a ceremony which among the Jains as well as among orthodox Hindus fixes a boy in his own family so that he cannot thereafter be adopted. The contention is not that the custom amongst the Jains is similar to that recognized by the Hindus of the twice-born classes, but is a custom akin to that which is binding among the *Sudras* whereby it is said marriage is a bar to adoption. On the part of the appellant, on the other hand, it is contended that with the Jains adoption is purely a secular matter; that they have no belief in the doctrine of the efficacy of initiatory ceremonies and do not perform *sradhs* and that no reason exists for imposing any limit of time or circumstance in the matter of adoption.

There is not much case law on the subject before us. In the case of *Maharaja Govind Nath Ray* v. *Gulab Chand* (1) it was held, accepting the authority of the Pandits, that amongst the Jains a widow was competent to adopt without the sanction of her husband, and that the qualifying age of the adoptee extended to the 32nd year. If the qualifying age is extended to the 32nd year the presumption is that marriage furnished no ba

(1) (1838) 5 S. D. A., 276.

to adoption, seeing that in every class of Hindus boys are usually married before they attain puberty. In *Sheo Singh Rai* v. *Dakho* (1) it was held that a sonless widow can adopt a son without the authority of her husband. On appeal from the decision of this Court in this case, their Lordships of the Privy Council at page 704 of the Report quoted and concurred in the following passage, contained in the judgment of the High Court:—"It appears to us that, so far as usage in this country ordinarily admits of proof, it has been established that a sonless widow of a *Saraogi Agarwala* takes by the custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus; that she takes an absolute interest at least in the self-acquired property of her husband and as we have said it is not necessary for us to go further in this, for the property in suit was purchased by the widow out of self-acquired property of her husband; that she enjoys the right of adoption without the permission of her husband, or the consent of his heirs, that a daughter's son may be adopted, and on adoption takes the place of a begotten son. It also appears proved by the more reliable evidence that on adoption the estate taken by the widow passes to the son as proprietor, she retaining a right to the guardianship of the adopted son and the management of the property during his minority, and also a right to receive during her life maintenance proportionate to the extent of the property and the social position of the family." We may observe that the parties to the appeal before us are *Saraogi Agarwalas*. In the case of *Lakhmi Chand* v. *Gatto Bai* (2) it was held that a Jain widow had power to make a second adoption on the death of the child first adopted. Petheram, C.J., and Straight, J., in their judgment say:—"It is true that the powers of a Jain widow in the matter of adoption are of an exceptional character, namely, that she can make an adoption without the permission of her husband, or the consent of his heirs, and that she may adopt a daughter's son; and, further, that no ceremonies or forms are necessary." But they go on to say:—"Except that in these respects it is not controlled by the Hindu law of Adoption, we think that in all others its principles and rules are applicable, and that the *krityima* form of

(1) (1878) I. L. R., 1 All., 688. (2) (1886) I. L. R., 8 All., 310.

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adoption not being recognized in the Jain community, or among the Hindus of these Provinces, it must be assumed that she had the power to make a second adoption, and that such adoption was to her husband."

Mr. Golap Chandar Sarkar in his work on the Hindu Law of Adoption, at page 359, states that "neither in the *Smritis*, nor in the commentaries on general law is there any restriction as to the age of a person which limits his capacity of being adopted. On the contrary, an obvious inference may be drawn from the definitions of the *kritrima* and the self-given sons, that there was no limitation of age for affiliation. The Vedik story of *Sunah Sepah's* adoption proves that such restriction did not exist; for, according to the story, he took a prominent part in the performance of the ceremony which could be done by a person whose *Upanayana* rite had been performed. "It is no doubt desirable," he adds, "that the boy should be adopted at a tender age so that he might be thoroughly assimilated to the family into which he is adopted and being bred up from his infancy amidst its members looked upon as a natural relation. The matter, however, was, as it properly should be, left to the discretion of the parties concerned by the sages, who did not lay down any rule on the point." Then he refers to the restrictions introduced by Nanda Pandita and other modern writers upon the authority of a passage of the *Kalika Purana*, the authenticity of which is doubted, and he says that "if you leave aside the passage of the *Kalika Purana*, the authenticity of which is doubted, then there is no authority in Hindu law for the proposition that any of the initiatory ceremonies must be performed in the adopter's family in order to cause filial relation: in other words, that if all or any of the initiatory rites for a person have been performed in the family of his birth, he becomes incapable of being adopted in any other family;" and later on, referring to the *Sudras*, he states:— "Nor is there any passage of law declaring that in the case of *Sudras* marriage is a bar to adoption." He subsequently refers to the relaxations of the rule in Madras, Bombay and the Punjab, noting the fact that the Bombay High Court ruled that among all classes even a married man may be adopted, whether he belongs to the same *gotra* with the adopter or not. *Raje Vyankatrav*

Anandram Nimbalkar v. *Jayantrav* (1); *Nathaji Krishnaji* v. *Hari Jagoji* (2); *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (3); *Lakshmappa* v. *Ramava* (4); *Dharma Dagu* v. *Ramkrishna Chimnaji* (5).

According to the cases last cited it appears that in Bombay a married Brahman may be lawfully adopted, whether or not he belongs to the same *gotra* as the adopter. As, however, the law of the *Mayukha* prevails in Bombay, the authorities in that Province do not afford us much assistance. At the same time they are instructive and suggestive. There is no restriction in the matter of age to be found in Manu or in the *Smritis*. The adoption of a married man of whatever age is not forbidden by the *Mitakshara*. Mr. Ghose in his work on Hindu Law says that "the authentic *Smritis* are very reticent about the qualifications of the boy to be adopted. The complicated rules laid down by our Courts are based only on certain texts of *Saunaka*, the *Vridha Gautama*, and the *Kalika Purana*, not cited in the older books like the *Mitakshara* or the *Smriti Chandrika*, the *Parasara Madeva* or even in the *Dayabhaga* or by the *Mithila* writers. No Hindu lawyers who had critically examined the *Smritis* would have placed any reliance on these texts and on the rules of the *Dattaka Mimansa* and the *Dattaka Chandrika* (2nd Edition, at p. 598). A majority of a Full Bench of the Court held that the *Dattaka Mimansa* was not an infallible guide in questions of adoption, in the case of *Bhagwan Singh* v *Bhagwan Singh* (6) and refused to follow it: but their decision in that case was set aside by their Lordships of the Privy Council, who observed in their judgment, referring to the *Dattaka Mimansa* and *Dattaka Chandrika* as follows:—"To call it infallible is too strong an expression, and the estimates of Sutherland and West and Buhler seem nearer to the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become imbedded in the general law" (7). In view of the ruling of their Lordships we should not be justified in disregarding the rules laid down in these

(1) (1867) 4 Bom., H. C. R., A. C. J., 191.
(2) (1871) 8 Bom., H. C. R., A. C. J., 67.
(3) (1874) 11 Bom., H. C. Rep., 190.
(4) (1875) 12 Bom., H. C. R., 384.
(5) (1888) I. L. R., 10 Bom., 80.
(6) (1896) L. R., 17 All., 204.
(7) (1898) I. L. R., 21 All., 412.

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works. But it is admitted that these rules cannot and do not apply to the Jains, unless it be that the Jains are to be treated as ranking with *Sudras*, and are governed by the rule laid down in the *Dattaka Chandrika* which renders marriage a bar to adoption in the case of *Sudras*. The contention put forward on behalf of the appellant is not that the rule of law prevailing amongst the twice-born castes as regards adoption governs the Jains, for this is not the appellant's case, but that the Jains are prohibited like the *Sudras* from adopting a boy after marriage. It is difficult to see why this should be so. The Jains are mostly Vaishyas, one of the three twice-born classes, and the exceptional rules laid down for *Sudras* therefore can have no place in matters relating to them The ordinary Hindu law is that of the three superior castes, and if that law in matter of adoption admittedly does not apply to the Jains, we are compelled to see what rule or custom of adoption does prevail amongst them. That their custom is at variance with that prevailing amongst orthodox Hindus is admitted; but it is said that among them, as with *Sudras* marriage is a bar to the eligibility of a boy for adoption. It is difficult to find any reason for this restriction. Adoption being a secular and not a religious matter with the Jains renders it improbable that any such bar should exist. The custom set up is one which merely extends the area of choice by the rejection of restrictions, probably of recent growth, which in the order of things are inapplicable. The restrictive rules as regards adoption, according to Mr. Mayne, as we have already pointed out, are of Brahmanical origin. "The Brahmans," he writes, have almost succeeded in blotting out all trace of a usage existing previous to their own" and "the series of elaborate rules which now limit the choice of a boy, are all the offspring of a metaphor; that he must be the reflection of a son." Many of these restrictions no doubt were imposed long after the Jains had parted company from Hinduism upwards of 2,500 years ago. After a careful consideration of the case we have come to the conclusion that the evidence satisfactorily shows that the Jains in these parts do not regard marriage as a bar to the eligibility of a youth for adoption; that married as well as unmarried boys are amongst them eligible. The reasonable inference to be drawn, we think, from the

authorities and from the evidence given in proof of instances of the adoptions of married boys for the last 40 years is that at the time when Jains dissented from Hinduism, the restrictions imposed in the matter of adoption on orthodox Hindus did not exist; that these restrictions were imposed by the Brahmanical priests of later years and only apply in the case of orthodox Hindus, and that the custom which allows of the choice of married and unmarried youths alike prevails among the Jains and is one of antiquity. We, therefore, decide this question in favour of the respondents. It is unnecessary to determine the further point raised by Mr. *Sundar Lal*, namely, that the Hindu law permitted the adoption of a married man provided that he belonged to the same *gotra* as that of the adoptive father.

There are several minor matters to which the appellant has taken exception in the decree of the Court below. He complains that the Court has erred in holding that a bungalow described as No. 115, and the decree obtained in a suit brought by him against Rana Prithi Singh and Kartar Singh formed part of the joint property. We think that the appellant has not established his right to either the bungalow or the decree. From the evidence of Banarsi Das we find that the appellant purchased the *kothi* in question in his own name, but that the purchase money was defrayed out of the moneys of the Meerut shop, which belonged to the joint family. Appellant did not out of his own funds pay any portion of the purchase money. As to the decree Banarsi Das states that Rs. 15,000 were lent to Rana Prithi Singh during the life time of Ganeshi Lal on the security of a bond executed in favour of Kedar Nath. The plaintiff brought a suit upon this bond and the expenses of the suit are entered in Kedar Nath's account in the account books of the Meerut shop. The money advanced to Prithi Singh was, he stated, given by Lala Ganeshi Lal to Kedar Nath. The appellant has failed to satisfy us that these items of property were incorrectly regarded by the Court below as joint family property.

The respondents have filed objections under section 561 of the Code of Civil Procedure. Of these the following have been pressed. It is alleged that the sum of Rs. 40,000 was paid to Musammat Kishen Dei, and Rs. 5,000 to Musammat Baino, and that the

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Court below has not allowed credit for these payments. The only evidence in support of these statements is the following. Badri Das in his evidence stated that Banarsi Das paid Rs. 5,000 to Musammat Baino, and Rs. 40,000 to Ganeshi Lal's widow and that Manohar Lal gave his consent to these payments. Banarsi Das in his evidence corroborates that of Badri Das. He stated that Rs. 40,000 were given to Musammat Kishen Dei about 2½ years ago after pressing demands made by her. He said that Badri Das, Manohar Lal and he consulted together about the matter and decided that it was necessary to appease Musammat Kishen Dei and that Rs. 40,000 should be given to her, and that Rs. 40,000 were given to her. Manohar Lal in his evidence denies all knowledge of this transaction. He says that Rs. 40,000 were not given to Musammat Kishen Dei in his presence, nor was Rs. 5,000 given to Musammat Baino, nor was he consulted regarding the payment of either of these sums. It is remarkable that no receipt for or acknowledgment of the payment of these large sums, if it was ever made, was obtained from either of these ladies. We agree with the Court below that the payment of these sums has not been satisfactorily proved.

The next objections are that a *rukka* for Rs. 300 and a mortgage deed for Rs. 3,200 in favour of Badri Das, and *rukkas* for Rs. 5,000 and Rs. 500 in favour of Banarsi Das, together with several ornaments pledged with Banarsi Das for Rs. 2,500, are the separate properties of Badri Das and Banarsi Das and that certain moveables claimed by the respondents as their exclusive property were their joint property. In support of these objections the respondents relied on the evidence of Banarsi Das. He stated that he got a *rukka* for Rs. 300 from Shahzad Rai and also a hypothecation bond for Rs. 3,200 executed by Haidar Shah and others. Badri Das admits in his evidence that he received Rs. 30,000 from the joint family funds for expenses and that this sum was debited to him in the accounts of the *kothi*. Banarsi Das also in his evidence stated that Ganeshi Lal and he decided to pay Rs. 30,000 to Badri Das and to have that item entered in the expense account. There appears to be little doubt that the moneys lent to Shahzad Rai and Haidar Shah by Banarsi Das formed part of money which he had received from

the joint family funds, and that in any case he would be bound to account for the Rs. 30,000 which he had received and which was debited to him in the account books before he can establish a claim to the two sums of Rs. 300 and Rs. 3,200. The property of each individual member is presumed to belong to the common stock, and no evidence has been laid before us which would lead us to think that these two sums should be excluded from the division of the joint family property as being the exclusive property of Banarsi Das. The same observation applies to the house described as house No. 13, which undoubtedly belonged to the family, but upon which Badri Das would appear to have expended sums amounting to Rs. 9,000 or Rs. 10,000. This house is the subject of objection No. 8, which is that the Court below should have allowed to the respondent Badri Das Rs. 10,000 spent by him on improvements to house No. 13 or should have directed that house to be allotted to him at its original value. In view of all the circumstances, we hold that this house formed part of the joint family property and that the money spent upon it formed part of the joint funds.

The only other matter remaining to be considered is the form of the decree passed by the Court below. The decree is that the plaintiff be put in absolute and separate possession of one-fifth share in the immovable and movable property mentioned in the lists appended to the decree, and that Musammat Baino, Banarsi Das, Badri Das and Mul Chand are each entitled to a one-fifth share in the same property. This is clearly an improper decree. What is desired by the plaintiff appellant is that the joint immovable and movable property should be partitioned. The Court below should therefore after ascertaining of what the joint property consisted and the rights of the various parties therein, have issued a commission to such persons as it thought fit to make a partition according to such rights as provided by section 396 of the Code of Civil Procedure.

We, therefore, dismiss the appeal with costs, to be paid by the appellant. We remand the case to the Court below with directions that the partition proceedings be carried out in accordance with the directions given above, and in the course of the

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partition we direct in accordance with this agreement of the parties that a sufficient portion of the family property be exclusively charged with the maintenance allowance for Musammat Chameli as already fixed in exoneration of the residue of the property.

We dismiss the objections with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.
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April 25, 30,
May 15.

HAR SHANKAR PARTAB SINGH AND ANOTHER (PLAINTIFFS) *v.* LAL RAGHURAJ SINGH (DEFENDANT) *

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow.]

Res judicata—Civil Procedure Code, section 13—Award of committee of talugdars appointed under section 33 of the Oudh Estates' Act (I of 1869)—Question of adoption—Claim in former suit as adopted son—Estoppel—Evidence and proof of adoption—Evidence of adoption where lapse of time precludes proof—Presumption as to probability from conduct of parties.

In a suit by the appellant against the respondent for a share in certain family property the question was whether the respondent had been in 1853 validly adopted into another family.

Held that the committee of Talugdars appointed under section 33 of Act I of 1869 (Oudh Estates' Act) to decide on claims for maintenance is not such a Court as is described by section 13 of the Code of Civil Procedure (Act XIV of 1882), and their award refusing the respondent maintenance in his own family on the ground that he had been adopted into another was therefore not *res judicata* in the present suit. The committee had no jurisdiction to decide the question of adoption, and the affirmation of their award by the Financial Commissioner could not give judicial validity to their decision on a point outside their jurisdiction.

The fact that the respondent had in 1879 on the death of his alleged adoptive mother claimed to succeed her as the adopted son of her deceased husband, and so secured the succession to which the predecessor in title of the appellant, was then entitled, though he did not oppose the respondent's claim, did not estop the respondent from denying the alleged adoption in this suit.

To establish the fact of a valid adoption it was essential for the appellant to show that it was made by the direction of the deceased husband of the adoptive mother, and that the respondent's father had given him in adoption. In the absence of proof which the lapse of time made impossible, it was incumbent on the appellant before any presumption that those conditions were fulfilled was justified to establish an initial probability that the adoption was likely to have been validly made, and that the conduct of the parties cognizant of the facts had at least been consistent with such an hypothesis. But the evidence rather showed the contrary; and no weight could be given to the statements of the respondent, as they fell short of founding an estoppel, and as he had asserted or denied the adoption just as it suited his purpose throughout the whole of the protracted litigation between the members of the family.

APPEAL from a judgment and decree (December 16th, 1901) of the Court of the Judicial Commissioner of Oudh, which reversed

Present:—Lord ROBERTSON, Lord COLLINS and Sir ARTHUR WILSON.

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a judgment and decree (May 30th, 1901) of the Court of the Subordinate Judge of Partabgarh.

The matter in dispute in this appeal was the right of succession to the taluqa of Shamspur, and the main question for decision was whether or not the respondent Lal Raghuraj Singh was validly adopted as the son of Lal Bisheshar Bakhsh Singh by his widow Thakurani Baijnath Kunwar.

The facts which led up to the suit out of which this appeal arose were as follows :—

The Summary Settlement of the Kundrajit estate was in 1858 and 1859, made with *(a)* Thakurani Baijnath Kunwar, the widow of Lal Bisheshar Bakhsh Singh, *(b)* Lal Chattarpal Singh, *(c)* Lal Chandarpal Singh and Lal Surajpal Singh. A sanad was granted to them and they became taluqdars under section 8 of Act I of 1869 (the Oudh Estates' Act). In 1872 they effected a partition of the estate, dividing it into four mahals. Of these, mahal Barguon was allotted to Thakurani Baijnath Kunwar, and mahal Shamspur, the estate in dispute in the present appeal, to Lal Surajpal Singh.

Lal Surajpal died childless and intestate on 21st February 1892, and was succeeded by his widow Thakurani Raghubans Kunwar who took as her husband's heir a Hindu widow's estate. She died on 11th November 1901, and at her death the reversionary heirs of her husband were Balbhaddar Singh, the plaintiff, and Lal Raghuraj Singh, Chandarpal Singh, and Himmat Singh, the first, second and third defendants, respectively. As one of these four heirs the plaintiff became entitled to a one-fourth share of mahal Shamspur and the other property left by Thakurani Raghubans Kunwar at her death.

On the 23rd November 1901, the plaintiff made an application in the Revenue Court for mutation of names, but was opposed by the Court of Wards on behalf of the first defendant, in whose favour, on 19th March 1902, the Assistant Commissioner of Partabgarh ordered that mutation of names should be made.

The plaintiff, therefore, on 8th December 1903, instituted the suit out of which this appeal arose, and, after setting out the facts as above, alleged in his plaint that Lal Raghuraj Singh, the first defendant, who was the natural son of Ajmer Singh, had been

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adopted out of his own family, and had, by adoption, become proprietor of the Bargaon estate on the death of Thakurani Baijnath Kunwar on 15th January 1880 as the successor of Lal Bisheshar Bakhsh Singh and of Thakurani Baijnath Kunwar.

The first defendant alone defended the suit. In his written statement he stated "that Lal Bisheshar Bakhsh Singh did not adopt defendant No. 1, nor is the defendant No. 1 the adopted son of Lal Bisheshar Bakhsh Singh. If it be alleged by the plaintiff that he, defendant No. 1, was adopted by Thakurani Baijnath Kunwar, wife of Lal Bisheshar Bakhsh Singh, he (the plaintiff) should say whether Thakurani Baijnath Kunwar had the permission of her husband to adopt (a son) or not. The defendant No. 1 flatly denies that he, owing to any valid adoption which the plaintiff may assert, did not remain the son of his natural father Ajmer Singh."

The following issues were settled:—

(1) Is the plaintiff one of the four reversioners of Lal Surajpal Singh, and, as such, is he entitled to get one-fourth share in the properties in suit after the death of Thakurani Raghubans Kunwar?

(2) Was defendant No. 1 adopted by Thakurani Baijnath Kunwar with the permission, and after the death of her husband?

(3) Is the adoption valid?

(4) Is the question of adoption *res judicata*?

(5) Is the defendant No. 1 estopped from denying the adoption?

(6) Is the adoption valid, even if it be proved that the husband of Thakurani Raghubans Kunwar did not permit her to adopt?

The adoption was alleged to have taken place in or about 1853. The evidence adduced in support of it was entirely documentary, and showed that from the year 1867 the first defendant had repeatedly set up and asserted his adoption in Courts of Justice and elsewhere. The adoption was not acted on, the settlements were made with Thakurani Baijnath Kunwar and the first mention of an adoption was in a petition dated 3rd October 1864, in which Baijnath Kunwar stated that the last

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"now" adopted Lal Raghuraj Singh owing to her being childless and prayed for mutation of names in his favour. This was not done and the regular settlement was made with Baijnath Kunwar herself, who remained in possession as proprietor until her death.

It was not disputed, however, that the parents of Lal Raghuraj Singh died in his infancy, and that he was brought up and supported by Baijnath Kunwar, who performed all the ceremonies usually performed by parents and changed his name. She died on 18th December 1879. Claims to succeed her were made in the Revenue Courts by Chatrapal Singh who asserted *he* was her adopted son; by Lal Raghuraj Singh who asserted that Thakurani Baijnath Kunwar brought him up and adopted him from his infancy, "and having constituted him her heir and successor installed him on the *gaddi* in 1272 *fasli*"; and a third claim was made by Chandarpal Singh. On 23rd June 1880 an order was made directing the entry of Lal Raghuraj Singh's name in the Revenue Register as proprietor of the Bargaon estate in succession to Thakurani Baijnath Kunwar.

In consequence of that order Chatrapal Singh, on 13th November 1891, instituted a suit against Lal Raghuraj Singh to recover the estate from him. In defence Lal Raghuraj Singh denied Chatrapal Singh's adoption and set up an adoption of himself. Both parties, being unable to prove any permission to adopt on the part of Thakurani Baijnath Kunwar's husband, agreed on the pleadings that by custom such permission was *not* required. The Subordinate Judge of Partalgarh on 1st October 1894 dismissed that suit, and on appeal that decision was affirmed by the Court of the Judicial Commissioners of Oudh; both Courts finding that Chatrapal Singh had not been adopted, and that Lal Raghuraj Singh had been adopted by Thakurani Baijnath Kunwar. On appeal to the Privy Council their Lordships held that Chatrapal's adoption had not been proved, and expressed no opinion in regard to the adoption of Lal Raghuraj Singh.

The Subordinate Judge held that Lal Raghuraj Singh had been in fact adopted and that his adoption was valid in law; that he was estopped by his conduct from denying his adoption; and that the question of the adoption was *res judicata*, as the British India Association of Oudh who sat as arbitrators to decide

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claims for maintenance made against talukdars had on 16th December 1867 dismissed a claim made on behalf of Lal Raghuraj Singh against Surajpal Singh, on the ground that Thakurani Baijnath Kunwar had adopted him. In accordance with these findings a decree was made in favour of the plaintiff for a one-fourth share in taluqa Shamspur.

On appeal the Court of the Judicial Commissioner of Oudh (MR. R. SCOTT, Judicial Commissioner, and MR E. CHAMIER, Additional Judicial Commissioner) in a judgment delivered by the Additional Judicial Commissioner in which the Judicial Commissioner concurred, said:—

"The questions for decision are (1) whether the defendant is estopped from denying that he was validly adopted by Baijnath Kunwar, (2) whether the matter is *res judicata*, and (3) if the first and second questions are decided against the plaintiff, whether the plaintiff has proved that a valid adoption took place.

"Upon the first question I find no room for doubt. It is true that on the death of Baijnath Kunwar, the defendant claimed her estate as a son adopted by her; but how does this raise an estoppel? Chandarpal Singh objected; so also did Chattarpal Singh, and the latter brought a suit for the property. Partab Singh was the nearest reversioner at the time, but he was living with the defendant and did not claim the estate. The present plaintiff had no sort of right to the estate left by Baijnath Kunwar, and it cannot be said that he or any one through whom he claims abstained from claiming any property on the faith of the allegation made by the defendant that he had been adopted by Baijnath Kunwar. Thus disposes of the only ground upon which an estoppel was pleaded.

"The second question also is free from doubt. The Committee of Talukdars, before whom the defendant brought his claim for maintenance, held that he had been adopted by Baijnath Kunwar, and therefore could make no claim for maintenance against his brother Surajpal Singh. An examination of the proceedings shows that they were of the most perfunctory character, and it would be lamentable if titles to large estates were to depend upon such decisions as that of the Committee in the present case. Fortunately, it is not possible to hold that the decision of the Committee renders the question of adoption *res judicata*. The Committee had power only to deal with claims for maintenance, and even assuming, what I should hesitate to hold, that section 33 of the Oudh Estates' Act applies to cases where no maintenance was awarded by the Committee, but the claim was dismissed, a decision by the Committee of a question of title in the course of the trial of a claim to maintenance cannot be held to be equivalent to a decision of that question by a Civil Court. The Committee, if still existing, could not have entertained the present suit. It is clear, therefore, that the question of adoption is *not res judicata* but must be determined upon the evidence.

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"It is common ground that the defendant is now about 55 years of age, i.e., he was born in or about 1849 (see the proceedings of the Court below, dated April 9th). If the adoption took place, as alleged in 1853, he was at the time about four years of age. Bisheshar Bakhsh died in 1833 or 1834, leaving a son named Lachman Singh, who died in 1842 or 1843 while still a minor. This circumstance certainly does not render it probable that Bisheshar Bakhsh gave his wife power to adopt a son. On the contrary, it renders it somewhat unlikely that he should have thought of an adoption. Then again, the widow admittedly did not act upon the permission till 10 years after the death of her son and 20 years after her husband's death. This fact also certainly does not advance the plaintiff's case. In fact the plaintiff starts with an *à priori* improbability that Baijnath Kunwar received permission from her husband to adopt a son.

"At the Summary Settlement of 1858 not a word was said about the defendant having been adopted by Baijnath Kunwar (see defendant's exhibits A 12, A 13, A 14 and A 15). In the genealogical tree the defendant should have been shown as the son of Bisheshar Bakhsh and at all events as Raghuraj Singh, not as Bhagwat Parshad. It is contended that these exhibits are not admissible in evidence. The point is of no importance, inasmuch as it is admitted that the first that was said about an adoption according to the present record was in a petition presented by Baijnath Kunwar to the Deputy Commissioner on October 3rd, 1864. (Copy admitted in evidence in this Court.) In it she said 'That taluka Shamapur has been in the proprietary possession of the petitioner, and the Government revenue has been paid by her. Whereas, I have now adopted Lal Raghuraj Singh, owing to my being childless, that the adopted son is very intelligent and able, that he can himself manage the taluk dari affairs well and efficiently, that as the petitioner is a *purda-nashin* and as such is unable to attend before Government authorities and to manage the affairs, and she wishes to have the mutation of names effected during her lifetime in favour of her adopted son to ensure attendance before Government and the proper management of the talukdari affairs. Therefore submitting this petition for mutation of names, she prays that the name of her adopted son be substituted in place of that of her own, so obtaining her object, she may devote herself to pray for you.' Neither in this petition nor at any other time, so far as we know, did the Thakurani say that she had received permission from her husband to adopt a son. It is common ground that a ceremony known as the *Gaddi-nashini* ceremony took place in 1864, whereat in the presence of a large number of relatives, neighbours and servants, the defendant was formally placed on the *Gaddi* and presented to the assemblage as the owner of the estate; and it is contended that the expression, 'I have now adopted' refers more accurately to the *Gaddi-nashini* than to an adoption which took place 11 or 12 years before. This construction was approved by Mr. Ahmood in exhibit 26, but this Court in a suit between Chattarpal Singh and the defendant held that the meaning of the words was that the Thakurani had now (*i.e.* in 1864) given effect to the previous adoption. In my opinion this is a somewhat fanciful construction of the words. Their plain

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meaning is that the Thakurani had now, *i.e.* recently, adopted the defendant, but even if this is not their meaning, the words cannot be used as evidence of an adoption effected 11 years earlier.

"It is contended on behalf of the plaintiff that the following exhibits are admissible as evidence that an adoption took place in or about 1853. Exhibit (4), a statement by Partab Singh made on March 15th, 1884; (9) a statement by Chandarpal Singh made on March 14th, 1884; (10) a statement by Raja Chitpal Singh made on March 15th, 1884; (19) a letter written by Dhannukal Singh, dated December 1st, 1867; (20) a letter written by Raja Ajit Singh, dated December 1st, 1867; (21) a statement by Raja Ajit Singh made on February 19th, 1874; (24) a statement by Parshan Singh made on January 4th, 1884; (25) a statement by Janki Singh made on January 4th, 1884.

"Some of these exhibits were held to be inadmissible in the case brought by Chatterpal Singh. In my opinion all of them are inadmissible. They are statements made after the question of adoption had been raised. The last two are statements made by witnesses produced by the defendant in the case just mentioned. If they are admissible at all it is for the purpose of proving that the allegations then made by the defendant were supported by evidence produced by him.

"It appears to me that the only documentary evidence of the adoption of any importance is the petition of Baijnath Kunwar already noticed, and *(a)* the defendant's application to the Committee, dated June 30th, 1867 (Ex. 15); *(b)* the statements made by his agent before that Committee (Exs. 16, 17, and 18); *(c)* the judgment or award of the Committee of Talukdars in 1867 affirmed by the Financial Commissioner in 1869 (Exs. 13 and 14); *(d)* the defendant's application for mutation of names, dated January 15th, 1880 (Ex. 27); *(e)* the defendant's statement in the suit brought by Sukh Mangal in 1880 (Ex. 23); *(f)* the judgment of the District Judge in that case by which the adoption is said to have been recognized (Ex. 26); *(g)* the allegations made by the defendant himself in his written statement and deposition in the suit of Chattarpal Singh (Exs. 2 and 3); *(h)* the judgments of the Subordinate Judge, and of this Court in that suit (Exs. 6, 7, and 11); *(i)* the defendant's statement, dated 22nd September 1894, in the case of Chitpal Singh, who is said to have described himself as son of Bisheshar Bakhsh (Ex. 35); *(j)* the defendant's application for mutation of names upon the death of Raghubans Kunwar (Ex. 37).

"No oral evidence has been adduced by the plaintiff, but the defendant's pleader in the Court below admitted that the defendant lived with Baijnath Kunwar from the age of eight or ten months, that she performed all the ceremonies usually performed by parents, *e.g.*, *Mundan*, *Kanchadhan*, &c., and that she changed his name.

"The arguments of the learned Counsel for the plaintiff seemed to me to suggest that the defendant should not be allowed to go back upon his repeated admissions, even if in law he is not estopped from disputing the adoption and the question of adoption is not *res judicata*. But this is not a Court of

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morals, and we must examine the admissions made by the defendant, and if possible, appraise them at their true value.

"It is important to bear in mind that it is common ground in this case that the defendant's mother died when he was only eight or ten months old, and that his father died soon after that the exact date of the death of the father is disputed The defendant has sworn in the present case that his father died about seven months after his mother, and in this he is supported by the witness Kishenanand. The plaintiff has not committed himself to any definite statement on this point. It is impossible to ascertain exactly what the plaintiff's case is as to the date of the adoption. His pleader in the court below on April 9th, 1904, said:—'Defendant No. 1 was about two years old when he was adopted.' He is now 55 years of age. According to this the defendant was born in 1849 and was adopted in 1851, but the plaintiff relies upon paragraph 36 of exhibit 2, as showing that the adoption took place in 1860 *fasli* (which began on September 29th, 1852) and he has produced other documents according to which the defendant was adopted when he was 3, 4 or 5 years of age, *i.e.*, 1852, 1853 or 1855. The exact date of the adoption is of considerable importance, for the defendant's father admittedly died when the defendant was very young, and a question might arise as to who gave or could give the boy in adoption The fact that the defendant was brought up by the Thakurani is of very little value upon the question of adoption, for there is evidence that Chandarpal Singh, Chattarpal Singh, Surajpal Singh and other members of the family lived with Baijnath Kunwar when they were children Indeed, Chattarpal Singh brought a suit upon the allegation that he had been adopted by the Thakurani and a similar allegation was made in 1880 by Chandarpal Singh. Outside the defendant's own statements there is absolutely no direct evidence that the defendant was adopted at any time between 1851 and 1855.

"Let us now turn to the admissions made by him or persons representing him.

"The first in order of time made in 1867 was to the effect that he was adopted when he was 18 years of age, and after the *upanayan* ceremony, so that his connection with his natural family had not been broken (see exhibits 13, 16, 17 and 18). This statement is certainly in some respects inaccurate and it cannot be twisted into an admission that the defendant was adopted in his infancy. It agrees better with the statement of the Thakurani in her petition of October 1864. The recognition of his status as a validly adopted son by the Committee of Talukdars is of very little value. Their proceedings were irregular and their conclusions were based on nothing that deserves to be called evidence. They seem to have declined to refer to Baijnath Kunwar and to have given the present defendant no opportunity of producing evidence.

"The next statement to be noticed is the application for mutation of names in January 1880 (see exhibit 27). In this also the date of the adoption is not mentioned. The words used by the defendant are peculiar, namely, '*Thakurani Saheba ne ahd tafsilat se mujhko parwarish o mutabanna kia aur*

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tammam rasumat o shadi o biyeh mera khud kiya,' which may be translated 'since my infancy the Thakurani has provided for and adopted me and she has herself performed all my ceremonies and my marriage.' The word '*mutabanna*' ie the technical word for adoption, but it is often used loosely, and the words do not necessarily mean more than that the lady took and treated him as her own child, which no doubt was perfectly true. At all events there was no allegation of a ceremonial adoption. This allegation of an adoption at once brought Chhatrpal Singh and Chandarpal Singh into the field as objectors, a circumstance, which does not harmonise with the theory of an indisputable adoption in the early fifties known to all the members of the family. Partab Singh, the person who was most interested, did not object to the defendant's application, but seems to have been living with the defendant, was himself childless and was not on good terms with Surajpal Singh, to whom the estate would have devolved upon his death.

"The next statement is one made in Sukh Mangal's case in 1884 (exhibit 23). The defendant said:—'I remember the time of the Mutiny. I was adopted before that time. It must have been during the *Nawab* (Native rule). My real father Ajmer Singh had died when I was adopted. I cannot state the year when he died. What I have said about his death before my adoption is not absolutely certain, but such is my impression. I have no exact recollection of the ceremonies of my adoption.' This was probably intended to be an allegation of a ceremonial adoption, but if, as the defendant said, his father was then dead, who, did he think, had given him in adoption and how could a valid adoption have taken place, if there was no one to give him in adoption? It cannot be said that the Court in that case recognised the adoption of the defendant, for the learned Judge said that he considered it unnecessary to analyse evidence as to the adoption. The suit was disposed of upon a different ground altogether.

"Next comes the written statement and deposition of the defendant in the suit brought by Chhatrpal Singh (see exhibits 2 and 3). The defendant alleged a valid adoption in unequivocal language, but the value of the allegation is discounted by the fact that the parties agreed that Baijnath Kunwar had power to adopt a son without the express permission of her husband, a view entirely inconsistent with the law prevailing in this part of India, but which, no doubt, suited both parties, for probably neither of them could have proved actual permission. The recognition of the adoption by the Subordinate Judge in that case is not of much value, for, apart from the fact that the question of permission was not considered, he did not analyse the evidence on the question of the factum of the adoption. In this Court the evidence was analysed, but the Court put a construction upon the Thakurani's petition of October 1884 which I cannot accept, and the finding was not necessary to the decision of the case.

"Exhibit 35 only shows that the defendant is described as the son of Bishesher Bakhsh. It scarcely amounts to a statement by him to that effect. This exhausts the documentary evidence.

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"The plaintiff lays great stress upon the defendant's admission in previous cases, that he went to Allahabad, Benares and Gaya and there offered *pinda* in the name of Bisheshar Bakhsh Singh That he went to the places mentioned there can be no doubt. It is possible that he offered the *pinda* to Bisheshar Bakhsh and it was certainly easy for him to say that he did so. The pilgrimage to Gaya seems to have taken place before 1867. The Thakurani was at the time interested in making the defendant out to be her son, and I am unable to attach much importance to the evidence upon this matter. The fact that the Thakurani performed for the defendant the ceremonies or rites, which a parent would perform for a child is of very little value. She was *in loco parentis* towards him, having taken care of him ever since he was a child in arms and one is not surprised to find the defendant referring to her in one of his depositions as his mother. She is said to have done the same for Chandarpal Singh whom she also brought up. The plaintiff also relies strongly upon the fact that the defendant's name was changed, but there is no evidence that his name was changed before 1864.

"The conclusion at which I have arrived is that it is not proved that there was any real adoption of the defendant by Bujnath Kunwar, and it cannot be presumed or inferred from the evidence that Baijnath Kunwar had permission from her husband to adopt a son.

For the reasons already stated, I think it is unlikely that Bisheshar Bakhsh authorized Bujnath Kunwar to adopt a son. If she had adopted the defendant, her own estate would have divested: (see *Bhoobun Mayee Debia* v. *Ram Kishor Acharjee* (1); *Vullanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (2); and Mayne's Hindu Law, 6th Edition, pages 230, 238) and we should probably have found some reference to the adoption in the proceedings just prior to the Summary Settlement. Not only was nothing said about an adoption, but the defendant appears in the genealogical tree then filed under the name of Bhagwat Parshad It seems that Baijnath Kunwar was anxious to keep the taluqa intact. She pleaded that the estate had always been held by a single heir, and if she had adopted the defendant, the fact would have been well known to the family, and she would probably have put him forward as entitled to obtain a *sanad* for the whole estate. The fact that nothing was said about the adoption of the defendant at the Summary Settlement is the more remarkable, because Chattarpal Singh put himself forward as the adopted son of Bisheshar Bakhsh. The first that was said about an adoption of the defendant was in 1864 when, as I understand her petition, she referred to the adoption as a recent event. It seems to me that if an adoption took place it was in or about 1864. The plaintiff for obvious reasons does not rely upon any adoption in or about 1864. Upon the death of the Thakurain, and on subsequent occasions, the defendant seems to have taken advantage of the allegation of an adoption which was made in 1864 and 1867. His allegation that he had been adopted was challenged by two members of the family in 1880, one of whom subsequently brought a suit for the property

(1) (1865) 10 Moore's I. A., 279. (2) (1870) L. R. 4 I. A. 1, I. L. R., 1 Mad., 174.

possessed by the defendant. No act of the Thakurain has been proved which unmistakably points to an adoption having taken place before 1864, therefore it cannot be said that he has been recognized by the family as the adopted son of Bisheshar Baksh. The instances in which the adoption has been recognized by the Courts are not of much importance. The recognition was on each occasion due to statements made by or on behalf of the defendant, which are not conclusive as admissions, and were made to suit the exigencies of the time. Even if I could have found that the defendant was in fact adopted, I should have been unable to find that the adoption was made with the permission of Bisheshar Baksh. There is no direct evidence of permission, and in my opinion permission cannot under the circumstances of the case be presumed. It is conceded by the plaintiff that without the permission of her husband Baijnath Kunwar could not, according to the Hindu law as followed in this province, make a valid adoption, but it was suggested that there was evidence on which it could be found that by custom of the tribe or family a widow might adopt without permission. I can discover no evidence of any such custom. The only evidence that we were referred to was the award of the Committee of talukdars and the defendant's admission in the suit of Chattarpal Singh. The award seems to me to have no bearing whatever on this question, and the admission of the defendant in the previous case was evidently made to relieve him of a serious difficulty."

As the result of this decision the appeal was allowed and the suit dismissed.

On this appeal,

Mr. *G. E. A. Ross* for the appellant contended that the question of the adoption of the respondent was barred by the rule of *res judicata* as laid down in section 13 of the Code of Civil Procedure (Act XIV of 1882). The British India Association of Oudh, a Committee of Taluqdars who decides claims for maintenance, had on 16th December 1867, refused a claim for maintenance brought by the respondent against Surajpal Singh on the ground that he (the respondent) had been adopted by Baijnath Kunwar and that award was confirmed by the Financial Commissioner. Reference was made to the Evidence Act (I of 1872) sections 13, 40, 41, 42, and 43; *The Collector of Gorakhpur* v. *Palak Dhari Singh* (1); The Oudh Estates Act (I of 1869) section 33, as to the effect of awards made by the Committee of Taluqdars as to compensation and maintenance; *Bhagya Ardawan Singh* v. *Uday Partab Singh* (2); *Muhammad Imam Ali Khan* v. *Sardar Husain Khan* (3).

(1) (1880) I. L. R., 12 All., 1. (2) (1876) L. R., 23 I. A. 64 (69): I. L. R., 23 Calc., 838 (847, 848).

(3) (1898) L. R., 25 I. A., 161 (168, 169): I. L. R., 26 Calc., 81 (91, 92).

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It was also contended that under the circumstances of the case the respondent was estopped from disputing the fact and validity of his adoption: this contention was based on his general conduct and admissions in various documents, and the assertions of his adoption which he had repeatedly set up. The respondent in 1879 claimed to succeed Baijnath Kunwar as heir of her husband by adoption against Partab Singh through whom the appellants now claimed. It was submitted that, assuming that the onus was in the first instance on the appellants to show that there had been a valid adoption, the effect of these assertions and admissions was to shift the burden of proof on to the respondent to show that he had not been validly adopted; and that the evidence, oral and documentary, on which he relied, was insufficient to establish his case. Reference was made to *Chandra Kunwar* v. *Narpat Singh* (1).

It was further contended that the evidence on the record was sufficient to show that the respondent was the duly adopted son of Baijnath Kunwar and Lal Bisheshar Bakhsh Singh. If the evidence showed, as it was submitted it did, that Baijnath Kunwar adopted the respondent as a son to her deceased husband, it must be presumed that permission to adopt was given by her husband, and that the adoption was therefore validly made. Reference was made to a passage in Mayne's Hindu Law, 7th Ed., 204, to the effect that it was not necessary in all cases to produce direct evidence of the fact of the adoption when it has taken place long since, and where the adopted son has been treated as such by the members of the family, and in public transactions every presumption will be made that every circumstance has taken place which is necessary to account for such a state of things as is proved or admitted to exist; and *Rajendro Nath Haldar* v. *Jogendro Nath Haldar* (2) was cited.

Mr. *L. De Gruyther* for the respondent contended that his adoption by Baijnath Kunwar was not proved. It was essential to show that Bisheshar Bakhsh Singh gave authority to his widow to adopt. There was no evidence of any permission having been given, nor of any assertion that permission was given: such

(1) (1906) L. R., 34 I. A. 27 (35); I. L. R., 29 All., 184.

(2) (1871) 14 Moore's I. A. 67.

permission could not be presumed, and it must be taken, therefore, that there was no permission, and consequently no valid adoption. The evidence was referred to to show that no adoption of the respondent had in fact been made by Baijnath Kunwar.

As to the alleged estoppel there was none; the respondent's claim in 1879 was not contested by the then true heir Partab Singh, who made no claim himself, nor objection to the respondent's claim. His assertions and admissions in support of his adoption were not sufficient to estop him from now denying it, as he had also denied it on other occasions.

The award of the British Indian Association of Oudh in 1867 was not the decision of a Court within the meaning of section 13 of the Civil Procedure Code. That Association had no jurisdiction to try or decide the question of the adoption, and therefore their decision did not operate as *res judicata*. Reference was made to *Gokal Mandar* v. *Padmanand Singh* (1); *Misir Raghobar Dial* v. *Rajah Sheo Bakhsh Singh* (2); and *Chitpal Singh* v. *Bhairon Bakhsh Singh*; Sykes' Taluqdari Law 151, 153; and *Raj Bahadoor Singh* v. *Achambit Lal* (3) were also referred to.

Mr *Ross* replied.

1907, *May 15th*.—The judgment of their Lordships was delivered by LORD COLLINS:—

The appellants, who are the successors in a title of the original plaintiff, appeal from a decision of the Court of the Judicial Commissioner of Oudh in favour of the defendant Lal Raghuraj Singh, the present respondent, overruling a decision of the Subordinate Judge of Partabgarh in favour of the plaintiff. The matter in dispute is the right of succession to the taluqa of Silamspur and the question for decision is whether or not the respondent was validly adopted as the son of Lal Bishesar Bakhsh Singh by the widow of the latter, Thakurain Baijnath Kunwar. The suit was brought in the Court of the Subordinate Judge of Partabgarh by Balbhaddar Singh, the predecessor in title of the present appellants. The taluqa in question was

(1) (1902) L. R., 29 I. A., 196; I. L. R., 29 Calc., 707.
(2) (1882) L. R., 9 I. A., 197; I. L. R., 9 Calc., 432.
(3) (1879) L. R., 6 I. A., 110.

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granted by *sanad* to one Lal Surajpal Singh brother of the respondent in 1872. Lal Surajpal Singh died childless and intestate on the 21st February 1892, and was succeeded by his widow, Thakurani Raghubans Kunwar, who took the estate of a Hindu widow. She died on the 11th November 1901. On the 19th March 1902, the Assistant Commissioner of Partabgarh caused the name of the respondent to be entered as holder, and he obtained and holds possession. The original plaintiff thereupon claimed as one of four persons entitled to succeed on the death of the widow to a fourth share, and sought to oust the respondent by proving that he had been adopted into another family and thus lost the right which would otherwise have been his of succeeding to the property as heir to his natural brother, Lal Surajpal Singh. Hence the importance of the question, whether the respondent had been validly adopted out of his own family. There was considerable evidence of conduct on the part of the respondent holding out and asserting, when it suited his purpose to do so, that he had been adopted as the son of Lal Bisheshar Bakhsh Singh, and three issues were formulated and considered by both Courts on this part of the case,—

1. Was it *res adjudicata*?

2. Was the respondent estopped as against the plaintiff from denying it?

3. Supposing the plaintiff failed on both these issues, had he proved a valid adoption in fact?

The Subordinate Judge found all these issues in favour of the plaintiff. The Court of the Judicial Commissioner arrived at the opposite conclusion. It becomes necessary, therefore, to consider each of these questions.

First, as to *res adjudicata*. The contention of the plaintiff on this point is based upon the award of the Committee of Talukdars in 1867 affirmed by the Financial Commissioner in 1869. This award was made on a claim for maintenance or for a 4 anna share in the taluqa brought forward by the present respondent against Surajpal Singh. This claim was dismissed on the ground that the applicant (the respondent) had been adopted by Thakurani Baijnath Kunwar and had consequently ceased "to have any interest in the heritage of his natural father." The

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argument for the appellants on this part of the case was based on section 13 of the Code of Civil Procedure (Act XIV of 1882), which provides that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court." He is bound, therefore, to show that the Committee of Taluqdars formed such a Court, and he relies on section 33 of the Oudh Estates' Act, 1869, as justifying this contention. That section runs thus:—

"And whereas bodies of Taluqdars have in several cases made awards respecting the provision to be made for certain relatives of Taluqdars, and it is expedient to render such awards legally enforceable: it is hereby further enacted that every such award shall, if approved by the Financial Commissioner of Oudh and filed in his Court within six months after the passing of this Act be enforceable as if a Court of competent jurisdiction had passed judgment according to the award and a decree had followed upon such judgment."

It seems quite clear, therefore, that the Committee of Talukdars was not in any sense a Court, much less a Court with such jurisdiction as is described in the 13th section of the Civil Procedure Code above cited as essential to found an estoppel, and, for the reasons given in the judgment of the Additional Judicial Commissioner, their Lordships are of opinion that the Committee had no jurisdiction to decide the question of adoption and the affirmation by the Financial Commissioner of their refusal to award maintenance could not give judicial validity to their decision on a point outside their jurisdiction. Their Lordships therefore concur with the view taken by the Court below on this issue.

Next, as to the question of estoppel. That which is set up is said to arise from the fact that on the death of Thakurani Baijnath Kunwar in 1879 the respondent set up title to succeed her as the adopted son of her husband, Bisheshar Bakhsh Singh, and on this footing secured the succession to which Partab Singh, as the nearest heir, would have been entitled but for the respondent's intervention; that the respondent was thus estopped as against Partab from denying the adoption, and that the appellants are

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now claiming under Partab. But there is no evidence that Partab in any way opposed the respondent's claim; on the contrary, he was living with and apparently co-operating with the respondent at the time, and consequently the essential elements of an estoppel between these persons are lacking, and even if the appellants were claiming through Partab, they cannot establish an estoppel.

Their Lordships therefore agree with the Court below on this point also.

The remaining question is whether the appellants have established the fact that the respondent was effectually adopted as the son of Lal Bisheshar Bakhsh Singh. To establish this, they must prove that, if the adoption was ever formally made at all by Thakurani Baijnath Kunwar, as he alleges, it was made by the direction of her husband, and further that the respondent's father had given him in adoption. Having regard to the length of time which has elapsed since these conditions could have been fulfilled, if they ever were fulfilled, the appellants admit that they cannot prove them, but contend that they ought to be presumed. But to justify such a presumption they ought to establish an initial probability that the adoption was likely to have been validly made and that the conduct of the parties cognizant of the facts has been at least consistent with such an hypothesis. It would not be right to repeat here the reasoning by which the Court below had come to the conclusion that, putting aside the statements made by the respondent himself when it suited his purpose, the position of the Thakurani and the necessary consequences to her of the adoption rendered it unlikely that she should have made it; and that her conduct on crucial occasions was more consistent with the hypothesis that she did not regard him as having been validly adopted than that she did. It is quite clear that no weight can be given to any statements of the respondent, if they fall short of founding an estoppel, as he has asserted or denied the adoption just as it suited his purpose throughout the whole of the protracted litigation between the members of the family. It has been already pointed out that they do not suffice to found an estoppel, and, taking into consideration the rest of the

evidence, their Lordships fully concur in the reasoning and the conclusion of the Court below.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Walker & Rowe.*

Solicitors for the respondent :—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

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March 20.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

MADHUBAN DAS AND OTHERS (JUDGMENT-DEBTORS) *v.* NARAIN DAS AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, sections 368, 582 and 587—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 175C—Application to bring on to the record the heirs of a deceased respondent—Limitation.

Held that article 175C of the second schedule to the Indian Limitation Act applies as well to appeals from appellate decrees as to appeals from original decrees. *Susya Pillai* v. *Ayyakannu Pillai* (1) dissented from. *Vakkalagadda Narasimham* v. *Vahiuulla Sahib* (2) followed.

IN this case an application for execution of a decree was dismissed by a Munsif. The decree-holders thereupon appealed to the Subordinate Judge, who allowed the appeal and remanded the case to the Munsif under section 562 of the Code of Civil Procedure. Against this order of remand the judgment-debtors appealed to the High Court. When the appeal came on for hearing a preliminary objection was taken by one of the respondents to the effect that the appeal abated, the contention being that Narain Das, one of the respondents, had died on the 30th of May 1906 (the appeal having been filed on the 6th of June 1906), and that no steps had been taken within limitation to bring his representatives upon the record.

Munshi *Haribans Sahai*, for the appellants.

Munshi *Ishwar Saran* (for whom Pandit *Brij Narain Gurtu*), for the respondents.

* First Appeal No. 59 of 1906, from an order of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 17th of February 1906

(1) (1906) I. L. R., 29 Mad., 529. (2) (1905) I. L. R., 28 Mad., 498.

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KNOX and RICHARDS, JJ.—At the hearing of this appeal a preliminary objection was taken on behalf of Lachhman Das respondent to the effect that the appeal abated. It was contended from the papers on the record that Narain Das, one of the respondents to this appeal, had died on some date before the 30th of May 1906 and that the application to bring Lachhman Das and Ram Das on the record as representatives of Narain Das, deceased, had not been made within the six months prescribed. In answer to this the learned vakil for the appellants draws our attention to the Full Bench ruling of the Madras High Court—*Susya Pillai* v. *Ayyakannu Pillai* (1)—and argued that article 175C of the Indian Limitation Act did not apply to appeals from appellate decrees. The article which he wishes us to apply is article 178 of the Limitation Act. There is no doubt that the view taken by the Madras High Court supports the contention raised here, but, with all the respect due to the learned Judges who decided that case, we are not prepared to follow them. We prefer the reasoning which commended itself to a division bench of the same Court—*Vakkalagadda Narasimham* v. *Vahizulla Sahib* (2). The application made to bring the representative of the deceased respondent in an appeal, whether that appeal is an appeal from an original decree or an appeal from an appellate decree, is an application made under section 368 of the Code of Civil Procedure, the provisions of which have been extended in the one case by section 582 and in the other by section 587. Section 582 authorizes our reading section 368 as follows :—When the appellant fails to make such application within the period prescribed therefor, the appeal shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within the period prescribed therefor. The provisions of section 368 as altered by section 582 are, by section 587, to apply as far as may be to appeals from appellate decrees, and, though the amendment to the Limitation Act contained in article 175C might have been framed with greater care and precision, we are prepared to hold that the words contained in article 175C may be read so as to cover appeals from appellate decrees. This reading is sanctioned by the

(1) (1906) I. L. R., 29 Mad., 529. (2) (1906) I. L. R., 28 Mad., 498.

procedure followed by this Court ever since this amendment was introduced in the Limitation Act.

The learned vakil for the appellants asks us to grant him time to show that he was prevented by sufficient cause from making the application within the six months allowed. We think this application should be granted. Let the appeal stand over for three weeks.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr Justice Aikman and Mr. Justice Richards.

DOST MUHAMMAD KHAN (DEFENDANT) *v* MANI RAM (PLAINTIFF) AND RAHMAT-ULLAH (DEFENDANT) *

Civil Procedure Code, section 411—Suit in formâ pauperis—Court fee—Property of defendant sold to realize court fee—Property sold subject to a mortgage—Rights of mortgagee.

Held that the sale, subject to a mortgage, of property belonging to the defendant in a suit brought *in formâ pauperis* for the purpose of realizing the court fee payable to Government by the plaintiff does not preclude the mortgagee from bringing to sale the same property in execution of a decree for sale on his mortgage *The Collector of Moradabad* v. *Muhammad Daim Khan* (1) overruled. *Gangat Pataya* v. *The Collector of Kanara* (2) distinguished.

THE facts of this case are as follows:—

One Rahmat-ullah executed a mortgage in favour of Ram Charan Das on the 15th of April 1895 purporting to hypothecate in it the whole of a certain house. The mortgagee subsequently instituted a suit to realise the amount of the mortgage, but, having ascertained that the mortgagor was only entitled to mortgage a $\frac{7}{16}$ share of the house, he confined his claim to that share and obtained a decree for sale on the 29th of June 1898. This decree was on the 7th of April 1899 transferred to the plaintiff Lala Mani Ram. Musammat Hafizan Bibi, a sister of the mortgagor, was entitled to a share in the house in question, and she on the 21st of January 1899 instituted a suit *in formâ pauperis* against her brother to have the mortgage set aside so far as regards

* Second Appeal No 541 of 1904, from a decree of C. Rustomjee, Esq., District Judge of Allahabad, dated the 16th of March 1904, modifying a decree of Mr. H. David, Subordinate Judge of Allahabad, dated the 16th of December 1902.

(1) (1873) I. L. R., 2 All., 196. (2) (1875) I. L. R., 1 Bom., 7.

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her share in the house. On the 29th of July 1899 a decree was granted to her which directed that the court fee should be recovered from Rahmat-ullah. In execution of that decree a $\frac{7}{16}$ share in the house were sold subject to the mortgage executed by Rahmat-ullah in favour of Ram Charan Das and purchased by the defendant appellant Dost Muhammad Khan on the 2nd of May 1901. The plaintiff Lala Mani Ram then, as assignee of the mortgage of the 15th of April 1895, applied for sale of the mortgaged property. An objection to the sale was filed by the defendant appellant, who alleged that the property having been sold to him in the pauper suit against Rahmat-ullah could not be again sold. This objection found favour and was allowed, and hence the present suit for a declaration that the plaintiff is entitled to have the aforesaid shares in the house brought to sale. The first Court (Subordinate Judge of Allahabad) decreed the claim, but the lower appellate Court (District Judge of Allahabad) modified the decree of the Court below and directed that the defendant Dost Muhammad Khan should receive out of the proceeds of the sale Rs. 176, being the amount paid by him for the purchase of the house. The plaintiff submitted to this decree, but the defendant, Dost Muhammad Khan, not being satisfied with it appealed to the High Court.

The appeal originally coming on for hearing before a Bench of two Judges was laid before a full bench by order of the Chief Justice in view of the ruling in the Case of *the Collector of Moradabad* v. *Muhammad Dazm Khan* (1).

Mr. *M. L. Agarwala* and Maulvi *Rahmat-ullah*, for the appellant.

Mr. *B. E. O'Conor* and Babu *Lalit Mohan Banerji*, for the respondents.

STANLEY, C. J.—The facts of this case may be shortly summarized. One Rahmat-ullah executed a mortgage in favour of Ram Charan Das on the 15th of April 1895 purporting to hypothecate in it the entire of a certain house. The mortgagee subsequently instituted a suit to realise the amount of the mortgage, but, having ascertained that the mortgagor was only entitled to mortgage a $\frac{7}{16}$ share of the house, he confined his claim to that

(1) (1879) I. L. R., 2 All., 196.

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share and obtained a decree for sale on the 29th of June 1898. This decree was on the 7th of April 1899 transferred to the plaintiff Lala Manni Ram. Musammat Hafizan Bibi, a sister of the mortgagor, was entitled to a share in the house in question, and she on the 21st of January 1899 instituted a suit *in formâ pauperis* against her brother to have the mortgage set aside so far as regards her share in the house. On the 29th of July 1899 a decree was granted to her which directed that the court fee should be recovered from Rahmat-ullah. In execution of that decree a $\frac{1}{16}$ share of the house were sold and purchased by the defendant appellant Dost Muhammad Khan on the 2nd of May 1901. The plaintiff Lala Manni Ram then, as assignee of the mortgage of the 15th of April 1895, applied for sale of the mortgaged property. An objection to the sale was filed by the defendant appellant, who alleged that the property having been sold to him in the pauper suit against Rahmat-ullah could not be again sold. This objection found favour and was allowed, and hence the present suit for a declaration that the plaintiff is entitled to have the aforesaid shares in the house brought to sale. The first Court decreed the claim, but the lower appellate Court modified the decree of the Court below and directed that the defendant Dost Muhammad Khan should receive out of the proceeds of the sale Rs. 176, being the amount paid by him for the purchase of the house. I may mention that the property was sold to Dost Muhammad Khan expressly subject to the mortgage executed by Rahmat-ullah in favour of Ram Charan Das. The plaintiff submitted to this decree, but the defendant not being satisfied with it has preferred this appeal. His case is that the claim of Government in respect of court fees was a prior charge upon the house taking priority to all demands, including the claim of the mortgagee Ram Charan Das and his transferee, and that the sale having taken place to satisfy the court fees there could not be a second sale. This contention is based upon the authority of the case of *The Collector of Moradabad* v. *Muhammad Daim Khan* (1). In that case it was laid down by Pearson and Spankie, JJ., that the Government takes precedence of all other creditors and that this principle is not liable to an exception in the case of lien

(1) (1878) I. L. R., 2 All., 196.

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holders. In that case the Government caused certain property belonging to one Bulaki Das, the defendant in a pauper suit, to be attached with a view to the recovery by its sale of the amount of court fees payable by the plaintiff in the suit. This property was subsequently attached by the holder of a decree against the defendant which declared a lien on the property created by a bond. The property was sold in the execution of this decree, and it was held that the Government was entitled to be paid first in priority to the mortgagee out of the proceeds of the sale the amount of the court fees which the plaintiff in the pauper suit would have had to pay had he not been allowed to sue as a pauper. In this case the learned Judges purport to follow an earlier decision of the Bombay High Court in the case of *Gampat Putaya* v. *The Collector of Kanara* (1), which they say appears to be applicable to the case before them. That case appears to me to be no authority for the proposition laid down by the learned Judges. It merely decided that the Crown has the first claim to the proceeds of a pauper suit to the extent of the amount of the court fee that would have been payable on the institution of the suit had the plaintiff not been a pauper. There is no doubt that under the provisions of section 411 of the Code of Civil Procedure the court fee payable in a pauper suit is a first charge on the subject matter of the suit and is recoverable by Government from any party ordered by the decree to pay the same, but it is not payable out of the property of a prior mortgagee of the party so ordered to pay. In the case before us, as also in the case of *The Collector of Moradabad* v. *Muhammad Daim Khan*, there was a prior mortgage subsisting over the property of the party who was liable to pay the court fee. I am at a loss to see how the Government's claim in respect of the court fee in such a case can be properly satisfied out of the property of the mortgagee who is in no way liable for its payment. The court fee is no doubt a first charge upon the interest of the mortgagor, but before the mortgagor is entitled to any benefit from the property mortgaged he must first satisfy the subsisting mortgage. It is the property alone of the mortgagor which is liable to satisfy the court fee. I am unable to agree with the view taken by the learned Judges who decided the case

(1) (1873) I. L. R., 1 Bom., 7.

in this Court to which I have referred. It was in consequence of this decision that this appeal was sent by the Judges before whom it originally came to a larger Bench. I would dismiss the appeal in the present case as wholly untenable.

AIKMAN, J.—I am also of opinion that this appeal must fail. One Musammat Hafizan Bibi brought a suit *in formâ pauperis* against her brother Rahmat-ullah and other relations for a declaration of her rights to certain property. She won that suit, and a decree was passed against Rahmat-ullah, who was ordered to pay the cost. Under section 411 of the Code of Civil Procedure, when a plaintiff in a pauper suit succeeds, the Court has to calculate the amount of court fees which the plaintiff would have had to pay had he not been permitted to sue as a pauper. This amount is declared to be a first charge on the subject matter of the suit, and the section further provides that it shall be recoverable by Government from any party ordered by the decree to pay the costs in the same manner as costs of suit are recoverable under the Code. The amount of court fee payable by Hafizan Bibi on her plaint, had she not been allowed to sue as a pauper, was Rs. 211. In order to recover this amount the Government, as it was entitled to do, proceeded to attach and sell certain house property belonging to the defendant Rahmat-ullah. That house property was previously under mortgage. At the sale, at the instance of Government, it was declared that the sale was to be made subject to the incumbrance previously created by Rahmat-ullah. Before the pauper suit the mortgagees had sued Rahmat-ullah on their mortgage and got a decree for sale of Rahmat-ullah's interest in this house property. This mortgage decree was assigned to the plaintiff Lala Mani Ram. When he proceeded to execute his decree he was resisted by Dost Muhammad Khan who had purchased Rahmat-ullah's rights in the house property at the sale held at the instance of Government to recover the amount due to Government for court fees. The appellant Dost Muhammad Khan bought the property for Rs. 176. His objection was sustained and the assignee of the mortgage decree has brought the suit out of which this appeal arises for a declaration that he is legally entitled to have the share of Rahmat-ullah valued at Rs. 2,000 sold in execution of

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the mortgage decree. The suit was decreed by the first Court. On appeal the learned District Judge varied the decree by directing that when the property was sold in execution of the mortgage decree Dost Muhammad Khan should be entitled to receive Rs. 176 out of the proceeds of the sale. With the propriety of this modification of the first Court's decree, we are not now concerned, as the plaintiff Lala Mani Ram has submitted to it. The defendant Dost Muhammad Khan comes here in second appeal and contends that the decree declaring the plaintiff's right to have the property sold under the mortgage decree is erroneous, inasmuch as the property having once been sold in satisfaction of a Crown debt cannot be sold again. There is no doubt that the ruling relied on, namely, *The Collector of Moradabad* v. *Muhammad Daim Khan* (1) supports the appellant's contention, but with all deference to the learned Judges who decided that case, I am of opinion that the view which they took is manifestly wrong. In support of their decision they relied on a decision of the Bombay High Court, in the case of *Ganpat Putaya* v. *The Collector of Kanara* (2). When that decision is referred to, it is clear, as the Chief Justice has pointed out, that it in no way supports the view taken by the learned Judges who decided the case reported in I. L. R., 2 All., 196. The decision of this latter case might work the gravest injustice if it were followed. No doubt the Crown as creditor takes precedence of all other creditors. But in my opinion the learned Judges who decided the case in I. L. R., 2 All., erred in saying that this principle is not liable to an exception in the case of lien holders. Save when otherwise provided by law, the Crown can only sell such rights as the person indebted to it possesses. In certain cases Government is declared to have a first charge on property. For instance when a plaintiff has brought a suit *in forma pauperis* and wins that suit the Government claim for the amount of court fees which would have been payable on the suit is declared by law (section 411, Code of Civil Procedure) to be a first charge on what the plaintiff has won by the suit. And that is only fair, for, had the plaintiff not been allowed to sue as a pauper, the plaintiff would not have succeeded in getting anything. Again the Land Revenue

(1) (1879) I. L. R., 2 All., 196. (2) (1875) I. L. R., 1 Bom., 7.

Act, *vide* section 141 of Act No. III of 1901, declares that in the case of every mahal the revenue assessed thereon shall be the first charge on the entire mahal, and following upon this, section 161 of the same Act provides that when a mahal is sold for arrears of revenue which have accrued due upon it, it shall be sold free of all incumbrances. But when any property of the defaulter, other than the mahal upon which the revenue is due, is sold to recover that revenue, the proviso to section 162 lays down that the provisions of section 161, namely, as to the sale free of all incumbrances, shall not apply to such sale. When the Government executed the decree against Rahmat-ullah, it could only sell such rights in the house as he had the time of sale, and the purchase by the appellant was, as was indeed expressly declared at the time of sale, subject to the previous incumbrance. I have no hesitation therefore in holding that the case of *The Collector of Moradabad* v. *Muhammad Daim Khan* was wrongly decided and that there is no force whatever in this appeal. I agree in thinking that it should be dismissed.

RICHARDS, J.—This appeal was referred to this Bench in consequence of the decision in the case of *The Collector of Moradabad* v. *Muhammad Daim Khan*. It would seem to me that but for that decision there would be no difficulty whatever in the case. Section 411 of the Code of Civil Procedure, dealing with suits *in forma pauperis*, provides as follows :—"If the plaintiff succeed in the suit, the Court shall calculate the amount of court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, and such amount shall be a first charge on the subject matter of the suit and shall also be recoverable by the Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable under this Code." Musammat Hafizan Bibi, having sued *in forma pauperis*, and succeeded, Government were entitled to a first charge on the proceeds of that suit. They were also entitled to proceed against the defendant in that suit, inasmuch as the decree made him liable for the plaintiff's costs. We have nothing here to do with the Government's right to a first charge on the proceeds of the suit. We are not dealing with any property which was recovered in the suit. Government, however, in exercise of the

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further right given them by section 411 proceeded to execute the decree to the extent of the court fees against the property of Rahmat-ullah. Rahmat-ullah was in possession of the house in question, but subject to a mortgage which he had already created in favour of the assignor of the plaintiff. In effect we are asked to say that this decree in favour of Government can be executed against property which Rahmat-ullah had not. All that could be sold in execution of the decree was the house subject to the mortgage. As a matter of fact at the time of the sale the mortgage in favour of the assignor of the plaintiff was duly notified and Government only asked for execution subject to the mortgage. Government had no charge whatever on the property of Rahmat-ullah. All they had was the rights of a preferred creditor, that is, a creditor taking priority over all other unsecured creditors. It seems to me that it is quite clear that this appeal ought to be dismissed. It is unnecessary for me to deal with the case of *The Collector of Moradabad* v. *Muhammad Dain Khan*. I entirely agree with the remarks made by the other members of the Court.

By the Court.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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April 20.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr Justice Sir William Burkitt.

RAN SINGH AND OTHERS (DEFENDANTS) *v.* SOBHA RAM (PLAINTIFF) *

Hindu law—Joint Hindu family—Liability of sons in respect of a mortgage executed by the father—Exemption of sons' interest—Subsequent suit against sons for share of debt payable by them—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 147, 132, 120

Certain joint ancestral property was mortgaged by the head of the family first in 1882 and again in 1893. Subsequently the second mortgagee redeemed the first mortgage. The second mortgagee then sued to recover the amount due on both mortgages by sale of the mortgaged property, and obtained a decree in March 1895 and an order absolute for sale on the 25th of October 1897. To this suit the sons and grandsons of the mortgagor were not made parties. The sons and grandsons of the mortgagor sued for and obtained a decree exempting their interest in the mortgaged property from the operation

* First Appeal No 193 of 1905, from a decree of Pandit Girraj Kishore Datt, Subordinate Judge of Moradabad, dated the 16th of December 1904.

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of the mortgagee's decree. The mortgagee then sued the sons and grandsons to recover from them a proportionate part of the amounts due on his mortgages. This suit was instituted on the 6th of April 1904.

Held that the mortgagee's suit against the sons and grandsons of the mortgagor was maintainable, and that it was not barred by limitation, the rule applicable being either article 147 or article 132 of the second schedule to the Indian Limitation Act, 1877.

Badri Prasad v. *Madan Lal* (1), *Maharaj Singh* v. *Balwant Singh* (2) and *Muhammad Ashari* v. *Radha Ram Singh* (3) distinguished. *Dharam Singh* v. *Angan Lal* (4) and *Arunachala* v. *Doraisami* (5) followed.

THE facts out of which this appeal arose are as follows:—

One Badan Singh, father of the first three defendants and grandfather of the other four, in July 1882 mortgaged certain property to Khetal Das and another. On the 24th August 1893 Badan Singh mortgaged the same property to Balak Ram, father of the plaintiff Sobha Ram, to secure the sum of Rs. 2,000. Subsequently Balak Ram obtained a decree by which, under the direction of the Court, he, by paying Rs 1,858-3-3, redeemed the prior mortgage of Khetal Das and so under the provisions of section 74 of the Transfer of Property Act acquired the position of first mortgagee on paying the Rs. 1,858-3-3, payment of which is admitted.

Balak Ram then instituted a suit against his mortgagor Badan Singh to recover the amount due on his mortgage of August 1893, and also to recover the sum he paid to redeem the prior mortgage, and for sale of mortgaged property in default of payment. He obtained a decree for sale in March 1895 and an order absolute for sale on October 25th, 1897. The only person impleaded as defendant in that suit was Badan Singh; his sons and grandsons were not made parties to it. Then Ran Singh the son of Badan Singh, and his two brothers and four nephews instituted a suit against Balak Ram to have their interest in the ancestral property exempted from sale on the ground that they had not been impleaded as parties in Balak Ram's suit although he knew of their existence. They obtained in April 1902 a decree declaring that their ¾ interest in the mortgaged property was not saleable in execution of the decree which had been given against their father and grandfather Badan Singh. Thereupon the

(1) (1893) I. L. R., 15 All., 75.
(2) (1906) I. L. R., 28 All., 503.
(3) (1900) I. L. R., 22 All., 307.
(4) (1898) I. L. R., 21 All., 301.
(5) (1888) I. L. R., 11 Mad., 413.

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present suit was instituted by Sobha Ram, son of Balak Ram, against the successful plaintiffs in the suit last mentioned to recover the sum of Rs. 5,453-3-3 said to be due on Badan Singh's mortgage and in default for sale of the ⅞ interest of the defendants in the mortgaged property which had been released in compliance with the decree of April 1902.

In the written statement the plea was taken that the suit was barred by section 13 and section 43 of the Civil Procedure Code and also that it was barred by limitation. It was also pleaded that the debt which formed the consideration for the mortgage in suit was not contracted for the benefit or necessity of the family, but was contracted for immoral and unlawful purposes.

The lower Court (Subordinate Judge of Moradabad) held that the suit was not barred by either section 13 or section 43 of the Code of Civil Procedure, and also that it was not barred by limitation. It held that the limitation period applicable was 60 years. The Court further held that the money (Rs. 2,000) which formed the consideration for the mortgage of the 24th August 1893 was borrowed for immoral purposes and was tainted with immorality. It therefore dismissed the plaintiff's suit so far as it was based on this mortgage of August 1893, but gave plaintiff a decree for the amount which had been paid by Balak Ram to redeem the earlier mortgage of July 1882.

From this decision both parties instituted cross appeals, the plaintiff challenging the correctness of the Subordinate Judge's finding as to the mortgage of August 24th, 1893, while the defendants contended that the suit against them is barred by limitation and that the plaintiff is not entitled to any relief. The present appeal is that of the defendants.

Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the appellants.

Babu *Jogendro Nath Chaudhri*, for the respondent.

BURKITT, J.—This and the connected Appeal No. 70 of 1905 are cross appeals from the judgment of the Subordinate Judge of Moradabad, dated December 16th, 1904, by which he partially allowed and partially dismissed the suit of the plaintiff Sobha Ram against the defendant Ran Singh and others.

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It appears that one Badan Singh, father of the first three defendants and grandfather of the other four, had in July 1882 mortgaged certain property to Khetal Das and another. On the 24th August 1893 Badan Singh mortgaged the same property to Balak Ram, father of the plaintiff Sobha Ram, to secure the sum of Rs. 2,000 Subsequently Balak Ram obtained a decree, by which, under the direction of the Court, he, by paying Rs. 1,858-3-3, redeemed the prior mortgage of Khetal Das and so under the provisions of section 74 of the Transfer of Property Act acquired the position of first mortgagee on paying the Rs. 1,858-3-3 payment of which is admitted.

Balak Ram then instituted a suit against his mortgagor Badan Singh to recover the amount due on foot of his mortgage of August 1893 and also to recover the sum he paid to redeem the prior mortgage, and for sale of mortgaged property in default of payment. He obtained a decree for sale in March 1895 and an order absolute for sale on October 25th, 1897. The only person impleaded as defendant in that suit was Badan Singh; his sons and grandsons were not made parties to it. Then Ram Singh and his two brothers and four nephews instituted a suit against Balak Ram to have their interest in the ancestral property exempted from sale on the ground that they had not been impleaded as parties in Balak Ram's suit although he knew of their existence. They obtained in April 1902 a decree declaring that their ⅞ interest in the mortgaged property was not saleable in execution of the decree which had been given against their father and grand father Badan Singh. Thereupon the present suit was instituted by Sobha Ram, son of Balak Ram, against the successful plaintiffs in the suit last mentioned to recover the sum of Rs. 5,458-5 said to be due on Badan Singh's mortgage and in default for sale of the ⅞ interest of defendants in the mortgaged property which had been released from attachment in compliance with the decree of April 1902.

In the written statement the plea was taken that the suit was barred by section 13 and section 43 of the Civil Procedure Code and also that it was barred by limitation. It was also pleaded that the debt which formed the consideration for the mortgage in suit was not contracted for the benefit or necessity

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of the family but was contracted for immoral and unlawful purpose.

The lower Court held that the suit was not barred by either section 13 or section 43 of the Code of Civil Procedure, and also that it was not barred by limitation. It held that the limitation period applicable was 60 years. The record does not contain any information as to the article of the Limitation Act which the defendants contended was applicable. The Court further held that the money (Rs. 2,000) which formed the consideration for the mortgage of the 24th August 1893 was borrowed for immoral purposes and was tainted with immorality. It therefore dismissed the plaintiff's suit so far as it was based on this mortgage of August 1893, but gave plaintiff a decree for the amount which had been paid by Balak Ram to redeem the earlier mortgage of July 1882.

From this decision both parties have instituted cross appeals, the plaintiff challenging the correctness of the Subordinate Judge's finding as to the mortgage of August 24th, 1893, while the defendants contend that the suit against them is barred by limitation and that the plaintiff is not entitled to any relief. I propose first to take up defendants' appeal (F. A. No. 193 of 1905). Both appeals were heard simultaneously.

Now the suit being admittedly one to enforce the pious obligation which the Hindu law imposes on a son to pay a father's debt not tainted with immorality and being, as contended for the appellants, a suit *sui generis* for which no special rule of limitation is provided, the learned advocate for the appellants contends that it comes under article 120 of the second schedule to the Limitation Act of 1877, which provides a period of six years from the time when the right to sue accrues. If this be the article applicable, there can be no doubt that the suit is barred. The learned advocate contended that there being no "contractual obligation" on the sons to pay, and the obligation being one which arose from their status as sons of the debtor, the only article of the Limitation Act which could apply was article 120. He also contended that the same article applied to the claim to recover the amount paid to discharge the prior mortgage of July 1882. The learned advocate cited the well-known case of *Badri Prasad* v. *Madan Lal* (1). But the

(1) (1893) I L. R., 15 All., 76.

principal matter decided in that case is that a suit like the present can be instituted against a son during the life-time of his father to enforce the pious obligation. The case nowhere touches on the question of limitation. Nor is the limitation question anywhere decided in *Maharaj Singh* v. *Balwant Singh* (1) which also was cited. It is also strongly contended that the remedy against appellants was exhausted by the suit instituted by plaintiff's father against Badan Singh and that therefore this suit could not be maintained. Pandit *Sundar Lal* for the respondent contended that the suit was one *on the mortgage* for sale of the defendants' appellants' interest in the mortgaged property in default of payment, and that the limitation article applicable to it was article 147 or possibly 132, as a suit to enforce payment of money charged on immovable property, and he also contended that the suit was maintainable. The learned advocate for the respondent chiefly relied on the case of *Dharam Singh* v *Angan Lal* (2). That case in almost every respect resembles the present case, except that in it no question of immorality was raised. In it four sons of the debtor had obtained a decree for recovery of possession of four-fifths of the mortgaged property on the ground that they were not parties to the suit in which the decree for sale had been passed against their father. Subsequently the mortgagee instituted a suit against the sons to recover from them four-fifths of the amount due under the mortgage and obtained a decree. On appeal to this Court Mr. Justice Banerji, who delivered the judgment of the Court, referred with approval to the case of *Arulsubra* v. *Doraisami* (3). That case was in many respects similar to the present case and to the case in 21 All., 301, mentioned above. One of the contentions in it was that the claim against the sons was one which should have been decided under section 244 of the Code of Civil Procedure in execution of the decree against the father. As to that question the learned Judges of the Madras High Court held (p. 415 of the report) that it (*i.e.*, the son's obligation to pay the father's debt) is an obligation *distinct from that created* by the decree which was passed against the father; that if the decree debt was either illegal

(1) (1906) I. L. R., 28 All., 518. (2) (1899) I. L. R., 21 All., 301.
(3) (1888) I. L. R., 11 Mad., 413.

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or immoral the sons would be under no obligation to satisfy it, though the decree against the father might be perfectly valid." They therefore held that the question of the son's liability could not be decided under section 244 of the Code. Further on the learned Judges, discussing the question of limitation, observe:—"The suit was clearly one to enforce payment of money charged on immovable property, and the contest was whether the charge was validly created by the father as against his sons. The claim is therefore not barred by limitation." As to the above Mr. Justice Banerji observed in 21 All., 301:—"I agree with the view of the learned Judges and hold that a suit like the present in which it is sought to enforce against Hindu sons their pious obligation in respect of their father's debts not tainted with immorality, is maintainable whether the debts were or were not secured by a mortgage and whether a decree in respect thereof had or had not been obtained against the father alone." These latter observations of our learned brother have reference to the contention raised in the case he was considering, and which is raised also before us, that the suit was not maintainable because judgment had been recovered on the original debt, and reference was made by analogy to the case of joint debtors under the same contract. As to this argument Mr. Justice Banerji was of opinion that such an analogy does not apply to the case of the liability arising from the pious duty of a Hindu son to pay his father's debts not tainted with immorality. "Such liability," the learned Judge observes, "arises not from the contract entered into by the father, but from the fact that he is the son of the father and that the debt incurred by the father is of such a nature that it is the duty of the son to pay it. It is a liability which the Hindu law imposes on the son and is independent of the contract made by his father. Whether the debt of the father has merged in a decree, or whether it subsists as a debt in respect of which no decree has been passed, the son is liable for it, provided it was not incurred for immoral or impious purposes." And further on, when considering the question as to whether a creditor's remedy against the son is lost by the omission to make the son a party to the suit against the father, the learned Judge observes:—"Their Lordships of the Privy Council have held in several well-known cases that the son's liability for

his father's debt is *unaffected by the procedure* to which the creditor may have resorted against the father alone for the recovery of the debt. In *Nanomi Babuasin* v. *Modhun Mohun* (1) their Lordships said :—'The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his *creditors' remedies for their debts* if not tainted with immorality.' If the father's debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." Upon these and other passages in cases decided by their Lordships of the Privy Council the learned Judge held that "upon the same principle on which a suit is allowable to the son, it seems to me that it is open to the father's creditor to bring a suit against the son to establish the latter's obligation to pay his father's debt." Further on in the judgment, referring to the case of a simple money debt, as to which it has been held that the omission by the creditor to implead the son in his suit against the father on the debt does not preclude the creditor from subsequently suing the son, the learned Judge observes that in his opinion "there is no difference in principle between the case of a debt secured by a mortgage and a simple money debt." "I am unable to hold," says the learned Judge, "that in the case of a mortgage debt the creditor is in a worse position than the holder of an unsecured debt." And finally after pointing out that the "obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only," and that "a judgment recovered against the *father only* does not therefore bar a suit against the son," the learned Judge, referring to the fact that a large portion of the mortgaged property had been taken out of the possession of the creditor, adds as follows :—"As four-fifths of the property which the creditor purchased at auction in satisfaction of

(1) (1885) I. L. R., 13 Calc., 21.

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his debt has been decreed to the sons and the creditor has thus been deprived of that portion of the property, his debt must be held to have remained *pro tanto* unsatisfied." Now these facts exactly fit in with those of the present case, in which three-fourths of the mortgaged property has been restored to the possession of defendants appellants. The decree against the father was unsatisfied to the extent of three-fourths. The case of *Muhammad Askari* v. *Radhe Ram Singh* (1) was not one which has any bearing on the liability of a son to pay his father's debts. In it the defendants were the managing members of a joint Hindu family trading business. Creditors instituted a suit in which they impleaded only the two managing members and obtained a decree for sale of the joint family property. On execution being taken out the other members of the joint family sued and obtained a decree declaring that their interest in the joint family property could not be taken in execution of the decree against the managing members. On this the creditor sued the successful plaintiffs to recover the debt, and it was held that the suit was maintainable and that the creditor's remedy was not exhausted by the first suit.

In my opinion the present suit is clearly maintainable against the appellants. In that matter I fully concur with the decision of our learned brother Banerji from which I have made very copious extracts. The question as to whether this suit was maintainable was not, as far as I can discover from the record, raised in the lower Court, but it was forcibly argued before us. I have no hesitation in holding that the plaintiff's remedy on the mortgage was not exhausted by the former suit, in which the father only was impleaded, and that notwithstanding that suit the defendants appellants are by reason of their pious duty liable to discharge as much of the mortgage debt as remains unsatisfied. On the question of limitation the learned Subordinate Judge was "unable to understand" why such a plea was raised. "The suit," he said, "is brought by the plaintiff to recover mortgage money due under a deed of simple mortgage and the prior mortgage money paid by his late father by sale of the mortgaged property, and a period of 60 years is prescribed for such a suit." In

(1) (1906) I. L. R., 22 All., 307.

these remarks I fully concur. The suit is no doubt founded on the appellants' pious duty of paying their father's debts not tainted by immorality, but it is none the less a suit on the mortgage. The learned advocate for the appellants did not cite any authority to show that the limitation rule applicable to these appellants is article 120 with a limitation of six years. His contention was that as the liability of the defendants appellants arose from their status in the family and was not a contractual obligation the suit against them was governed by article 120 of the Limitation Act. In this I cannot concur. The suit is one on a mortgage to enforce the appellants' liability to discharge Badan Singh's mortgage debt and is governed either by article 147 of the Limitation Act or by article 132 as held by the Madras High Court in the case cited above. To hold otherwise might have a startling result. For, to take the case of a suit instituted less than 60 but more than six years after the mortgage had become payable against a father and his sons, what would be the limitation rule applicable? According to appellants while the father would be liable the suit would be barred against the sons, and the result would be that only the father's interest in the mortgaged property would be affected, the sons wholly escaping. I cannot accept such a possibility as good law. Such an interpretation of the law would have the effect of compelling a mortgagee, perhaps against his will, to sue on the mortgage while the six years' limitation against the sons was still running. For the above reasons I hold (1) that the suit is maintainable against the defendants appellants, and (2) that it is not barred by limitation, the rule applicable being either article 147 or 132. The appellants having failed on both the points raised in their appeal I would dismiss this appeal with costs.

STANLEY, C.J.—I concur. It appears to me that the conclusion arrived at by my learned colleague is the equitable mode of escape from the extraordinary position created by the ruling in *Bhawani Prasad* v *Kulla* (1).

By the Court.—The order of the Court is that this appeal be dismissed with costs.

Appeal dismissed.

(1) (1895) I. L. R., 17 All., 537.

1907
April 23

Before Mr. Justice Sir George Knox.

MUHAMMAD RAZIM (PLAINTIFF) v. MIAN KHAN AND ANOTHER (DEFENDANTS) *

Lambardar and co-sharer—Powers of lambardar to deal with co-parcenary lands—Lease for seven years.

In the case of a lease of co-parcenary land granted by a lambardar, where there is any suspicion established that the lambardar has granted a long lease to the detriment of co-sharers, a heavy burden would be placed on the lessee to show that by custom or for some other cause the lambardar is authorized in granting the lease. On the other hand where the granting of the lease is shown to be for the benefit of the co-sharers and when the co-sharers presumably have been shown to have derived benefit under the lease the lease should not be set aside. *Jagan Nath* v. *Hardayal* (1), *Bansidhar* v. *Dip Singh* (2), *Mukta Prasad* v. *Kamta Singh* (3) and *Chattroy* v. *Nawala* (4) referred to.

THIS was a suit brought by one of the co-sharers in a village to have set aside a lease of co-parcenary lands granted by a lambardar. The lease was for seven years and had been granted on the 24th July 1901. Before the present suit was brought the lambardar who had granted the lease had ceased to hold office. The plaintiff alleged that the lease had been given out of sheer dishonesty and in order to cause loss to pattidars, and was one of several leases which had been given by the same lambardar. In defence fraud was denied. It was pleaded that the lease was lawfully executed for consideration, and that before the execution of the lease the lessee had cultivated the land on rent at 8 annas a bigha. The annual rent set out in the lease was Rs. 3 a bigha. The Court of first instance (officiating Munsif of Koil) decreed the claim. In appeal the District Judge, after finding that no fraud had been proved, went on to say that while the rent was lower than the rent paid for the neighbouring fields, still the land contained salt and was liable to inundation and produced only one crop a year. The appeal was decreed and the plaintiff's suit dismissed.

The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Munshi *Gulzari Lal*, for the respondents.

* Second Appeal No. 656 of 1905, from a decree of F.E. Taylor, Esq., District Judge of Aligarh, dated the 2nd of June 1905, reversing a decree of Babu Jogendro Nath Chaudhri, officiating Munsif of Koil, dated the 19th of December 1904.

(1) Weekly Notes, 1897, p. 207.
(2) (1897) I. L. R., 20 All., 488.
(3) Weekly Notes, 1906, p. 277.
(4) (1906) I. L. R., 29 All., 20.

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KNOX, J.—The facts out of which this second appeal arises are as follows:—The defendant first party had been granted a lease for seven years by the defendant second party over certain land, the subject matter of the present appeal. The lease was granted on the 24th July 1901. The defendant second party ceased to hold the position of lambardar before the present suit was brought and his successor, the plaintiff, here the appellant, brought the suit out of which this appeal has arisen to have the lease cancelled. He alleged that the lease had been given out of sheer dishonesty and in order to cause loss to *pattidars*, and is one of several leases, which had been given by the late lambardar. In defence fraud was denied. It was pleaded that the lease was lawfully executed for consideration, and that before the execution of the lease the lessee had cultivated the land on payment of rent at 8 annas a bigha. The lease set out the annual rental of the land to be Rs. 3 a bigha. The Court of first instance decreed the claim. In appeal the learned District Judge, after finding that no fraud had been proved, went on to say that while the rent was lower than the rent paid for the neighbouring fields, still the land is under the disadvantage of containing salt and is liable to inundation and able to produce only one crop in a year. It accordingly held that the plaintiff had failed to make out his case. The appeal was decreed and the suit of the plaintiff dismissed with costs.

In appeal here it was contended that the lambardar was not competent to grant a lease beyond the requirements of a particular year or season. In support of this reliance was placed on a ruling of this Court in *Jagan Nath* v. *Hardayal* (1) and also the cases of *Bansidhar* v. *Dip Singh* (2), *Mukta Prasad* v. *Kamta Singh* (3) and *Chattray* v. *Narmda* (4).

The first of these cases was one in which the lambardar had granted a perpetual lease of the common land of the village and within a few months of the granting of the lease one of the co-sharers came in and sought to have it set aside. It was held that the lambardar was not authorized to grant a perpetual lease, and the learned Judges went on to say, page 208:—"So far as we are aware a lambardar has no general power to grant any lease of

(1) Weekly Notes, 1897, p. 207.
(2) (1906) I. L. R., 29 All., 438.
(3) Weekly Notes, 1906, p. 277.
(4) (1897) I. L. R., 20 All., 20.

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co-parcenary land beyond such as the circumstances of the particular year or particular season may require."

In *Bansidhar* v. *Dip Singh* the lease was for ten years, and it was set aside, the learned Judge who decided the case holding that the lambardar has no general power of granting any lease of co-parcenary land beyond such as the circumstances of the particular year or particular season may require. The case, however, was a peculiar one and the lease was one given by a disappointed litigant, whose power as lambardar was soon about to cease, with the intention of damnifying his successful opponent in the partition proceedings.

In *Chattray* v. *Nawala*, to which I was a party, it was held that a lambardar should have power to make temporary lettings, but the duties imposed upon him do not seem to admit of his executing in favour of a lessee without the consent of the co-parcenary body a lease for a long term of years.

In one of the four cases mentioned it was held that a lambardar was competent to execute a lease for ten years without reference to other co-sharers, where the land would not otherwise be let and where it would be for the benefit of the co-sharers that the land be so let. I see that a similar view was taken by two other learned Judges in an unreported case, *Roshan Lal* v. *Muhammad Fazl Husain*, S. A. No. 123 of 1898, decided on the 14th of June 1900. The facts of this last mentioned case are more in harmony with the facts of the case before me. I also notice that the lease before me was granted in July 1901, and the present suit was not instituted till 1904: the plaintiff, who was co-sharer during these three years, must have received profits arising out of this very lease. For these reasons I do not think it will be equitable to allow him now to set aside this lease in the settlement of which no fraud took place, and apparently fair adequate consideration was given, merely on the ground that a lambardar has no authority to grant leases for long periods without the consent of co-sharers. It seems to me that every case of this kind must depend upon the facts and circumstances out of which the lease has sprung. Where there is any suspicion established that the lambardar has granted a long lease to the detriment of co-sharers, a heavy burden would be placed on the

lessee to show that by custom or for some other cause the lambardar is authorized in granting the lease. On the other hand, where the granting of the lease is shown to be for the benefit of the co-sharers and when the co-sharers presumably have been shown to have derived benefit under the lease, I do not think that the lease should be set aside. For these reasons I dismiss the appeal with costs.

Appeal dismissed.

Before Mr Justice Richards.

ACHHAIBAR DUBE (PLAINTIFF) *v.* TAPASI DUBE AND OTHERS (DEFENDANTS) *

Civil Procedure Code, section 317—Joint decree—Purchase at sale in execution by one decree-holder—Suit for declaration that property purchased was joint.

In execution of a joint decree on a mortgage one of the decree-holders obtained leave to bid at the auction sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property. *Held* that section 317 of the Code of Civil Procedure did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. *Bodh Singh Doodhooria v. Ganesh Chunder Sen* (1) referred to.

THE plaintiff in this case sued for a declaration that certain property which had been purchased at auction sale by the defendant Tapasi Dube, was the joint property of himself and the plaintiff. It appears that Tapasi Dube and Janki Dube, who were alleged to be members of a joint Hindu family, obtained a joint decree for sale of certain mortgaged property. When the property was sold, however, Tapasi Dube obtained leave to bid at the sale and purchased the property in suit for Rs. 950. This being the exact amount of the decree, including interest and costs, no money actually passed, but the purchaser was put in possession and the decree recorded as satisfied. In certain partition proceedings between the parties in the Revenue Courts, the defendants attempted to exclude this

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* Second Appeal No. 638 of 1905, from a decree of Munshi Achal Behari, Subordinate Judge of Gorakhpur, dated the 15th of April 1905, reversing a decree of Babu Lalgopal Mukerji, Munsif of Gorakhpur, dated the 16th of January 1905.

(1) (1873) 12 B. L. R., 317.

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property from partition, hence the present suit. The Court of first instance (Munsif of Gorakhpur) decreed the plaintiff's claim but on appeal this decree was reversed by the Subordinate Judge who held that section 317 of the Code of Civil Procedure was a bar to the suit. The plaintiff appealed to the High Court.

Mr. *M. L. Agarwala* and Babu *Parbati Charan Chatterji* (for whom Babu *Satya Chandra Mukerji*), for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

RICHARDS, J.—The facts out of which this appeal arises are somewhat peculiar. Tapasi Dube and Janki Dube obtained a joint decree for sale of certain mortgaged property. It appears that one of the decree-holders, Tapasi Dube, obtained leave to bid at the sale and he became the auction purchaser at the price of Rs. 950, which was the exact amount of the decree, that is, debt, interest and costs. He had taken the most active, if not the entire, part in the litigation which resulted in the decree in favour of himself and his co-decree-holder. He was allowed by the Court to take credit as against the purchase money for the amount of the decree, and consequently no money whatever was paid. When he applied for execution prior to his obtaining leave to bid, the application was made on behalf of himself and Janki Dube his co-decree-holder. Although there is no clear finding, it would appear that no part of the decretal money was ever paid by Tapasi Dube to Janki Dube. According to the allegations in the plaint, after the purchase Janki Dube and his successors in title remained in joint possession of the purchased property. But there is no specific finding on this point. The plaintiff further alleged that at the time of the purchase by Tapasi Dube he and Janki Dube were members of a joint Hindu family. This was not perhaps alleged by the plaintiff in his plaint as clearly as it might have been, but the defendants in their written statement raised the issue, and the Court of first instance framed an issue, but did not decide the question. I think the Court executing the decree ought not to have granted leave to Tapasi Dube to bid in his own name without obtaining the consent of Janki Dube, or at least ought to have called upon the latter to show cause why Tapasi Dube should not have leave to bid in his own name. Furthermore, Tapasi Dube having

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purchased in his own name, the Court executing the decree ought to have made Tapasi Dube bring the purchase money into Court, where it should have remained until an adjustment was made between the decree-holders. I merely mention these matters, because, if they had been considered in time, the present litigation would probably never have arisen. The immediate cause of the present suit was proceedings by the defendants in the Revenue Court, in which they claimed partition against the plaintiff of certain property alleging that in this partition the property purchased for Rs. 950 should not be considered as joint property. The plaintiff objected and claimed that the purchased property was joint like the rest and must be considered in making the partition. The Revenue Court stayed the partition and the plaintiff had to bring the present suit. The main defence, and only the point argued here, is that section 317 of the Code of Civil Procedure bars the plaintiff's claim. The Court of first instance held that section 317 did not apply to the circumstances of the present case. The lower appellate Court relying upon the decision in *Durga* v. *Bhagwan Das* (1) reversed the finding of the first Court and dismissed the plaintiff's suit as being a suit which could not be maintained having regard to the provisions of section 317. A number of cases have been cited, including the decision of the Privy Council on the corresponding section of Act VIII of 1859 in *Both Singh Doodhooria* v. *Ganesh Chunder Sen* (2). As the facts of all the cases cited are different from those of the present case, I consider that I am at liberty to deal with the provisions of the section apart from authority. It seems to be the unanimous view of all the Courts that section 317 and the corresponding section of the previous Act were enacted against what are known as *benami* purchases, that is, purchases made secretly by one person for another, the ostensible purchaser having no interest in the purchase and the real purchaser wishing for some reason that his name should not appear. I think that section was enacted to meet only this kind of transaction and to put an end to them by rendering impossible a suit by the real purchaser against the ostensible purchaser. To illustrate by an example. Suppose it were clearly proved that two partners had

(1) Weekly Notes, 1900, p. 190. (2) (1873) 12 B. L. R., 317.

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lent partnership money to a third person, obtained against him a joint decree, and in execution of that joint decree certain property was purchased at an auction sale by one of the decree-holders out of the partnership funds or by setting off the joint decree obtained by the partners. Section 317 could, I think, never operate to bar a suit brought by one of the partners for a declaration that the property purchased was partnership property. In such a case the plaintiff would not be merely setting up that the ostensible purchaser had purchased the property *benami* for him; but his case would be that the property purchased was partnership property by virtue of the partnership which existed between them altogether irrespective of the sale. Their Lordships of the Privy Council, in the case I have referred to above, in dealing with the corresponding section of Act No. VIII of 1859, at page 329 of the report, say as follows:—"Their Lordships will not inquire whether there is sufficient proof that Ram Soonder who purchased at an auction sale held a few days after the Act came into operation did obtain a certificate under the Act, or of its terms if he did obtain one; because, assuming him to have been the certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present. They were designed to check the practice of making what are known as *benami* purchases at execution sales, *i.e.*, transactions in which A secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family who, by the operation of law, and not by virtue of any private agreement or undertaking, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds. Their Lordships, no doubt, were dealing with a case of a joint Hindu family and it has not yet been ascertained whether Tapasi Dube and Janki Dube were or were not members of a joint Hindu family. If they were, the present case would be on all fours in this respect with the case before the Privy Council. It seems to me, however, that the principle of the reasoning of their Lordships of the Privy Council goes somewhat further than the case of a joint Hindu

family. For example the reasoning would apply with equal force to the case of a partnership under the circumstances I have supposed above. I think also, if the allegations of the plaintiff were proved, that is to say, that the plaintiff being entitled to half of the debt and interest recovered against Babu Janki Prasad, the defendants purchased the property by means of setting off the amount of the joint decree, and that the property so purchased from the date of the purchase up to the commencement of the proceeding for partition was treated as joint property, that the plaintiff would, notwithstanding the provisions of section 317, be entitled to a declaration that the purchased property was under the circumstances joint property and must be treated as such in the partition proceedings. I refer the following issues the Court of first instance through the lower appellate Court for findings:—(1) Were Tapasi Dube and Janki Dube at the date of the purchase of the property members of a joint Hindu family? (2) After the purchase by Tapasi Dube was the property now in dispute treated as the separate property of Tapasi Dube or as the joint property of himself and Janki Dube and the other co-sharers? (3) Did the money recovered by the decree against Babu Janki Prasad, in execution of which the property was sold, belong to Tapasi Dube and Janki Dube jointly or to any one of them separately, and if so, to whom? The Court will take such evidence as the parties may offer, and on return of the findings ten days will be allowed for objections

Cause remanded.

1907
May, 1.

Before Mr. Justice Griffin.

SHEO RAM TIWARI (DEFENDANT) v. THAKUR PRASAD AND OTHERS (PLAINTIFFS) *

Civil Procedure Code, section 578—Irregularity—Disposal of a suit on a Sunday

Held that the disposing of a civil suit on a Sunday is a mere irregularity which is covered by the provisions of section 578 of the Code of Civil Procedure. *Ram Das Chakarbati* v. *The Official Liquidator, Cotton Ginning Company, Limited, Cawnpore*, (1) and *Umatto Ram Chatterjee* v. *Protab Chunder Shiromonee* (2) referred to.

THE facts of this case, so far as necessary for the purposes of this report are as follows. A suit was pending in the Court of a Munsif. The Munsif went on Sunday, the 18th of June 1905, to make a local inspection in the presence of the parties. The parties then and there came to a compromise, which the Munsif embodied in a rubkar; and the same day, namely, Sunday, the Munsif passed a decree in terms of the compromise. The defendant appealed. The lower appellate Court (District Judge of Allahabad) upheld the defendant's contention that the decree was void as having been passed on a *dies non*, but dismissed the appeal on other grounds. The defendant appealed to the High Court renewing his objection that the decree was void in consequence of having been passed on a Sunday.

Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

GRIFFIN, J.—On Sunday, the 18th of June 1905, the Munsif made an inspection of the spot. The parties came to a compromise which was embodied in a rubkar. The Munsif on the same day gave a decree on the compromise. The defendant appealed to the District Judge, who, while upholding the defendant's contention that the decree was void having been passed on a *dies non* dismissed it on other grounds. The defendant appeals to this Court on the ground that the decree, being passed on a Sunday, was null and void. It is admitted that there is no authority of this Court directly bearing upon the question raised in this appeal. I am referred to the ruling in *Ram Das*

* Second Appeal No. 893 of 1905, from a decree of W. D. Burkitt, Esq., District Judge of Allahabad, dated the 30th of August 1905, confirming a decree of Babu Sruh Chandra Bose, Munsif of Allahabad, dated the 18th of June 1905.

(1) (1887) I. L. R., 9 All., 868. (2) (1871) 16 W. R., C. R., 230.

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Chakarbati v. *The Official Liquidator, Cotton Ginning Company, Limited, Cawnpore* (1). I am asked to infer from this ruling that a decree passed on a Sunday should be held null and void. No such inference, in my opinion is warranted. For the respondents it is contended that the Court of first instance in disposing of the case on a Sunday committed a mere irregularity, which is covered by the provisions of section 578 of the Code of Civil Procedure. The proceedings were held on the Sunday by consent of parties. I am of opinion that under these circumstances the Munsif in disposing of the case the same day committed merely an irregularity. It is not shown that this irregularity affected the merits of the case or that the Munsif had no jurisdiction.

In a case of *Umunto Ram Chatterjee* v. *Protab Chunder Shiromonee* (2), the objection taken was against the admission of a plaint on a Sunday. The objection was overruled.

I dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1907
May, 4.

Before Mr. Justice Banerji.

IN THE MATTER OF THE PETITION OF DAMMA. *

Criminal Procedure Code, section 435—Revision—Executive order—Order of District Magistrate dismissing head-man.

Held that an order passed by a District Magistrate under the rules framed by Government under section 45 (3) of the Code of Criminal Procedure is an executive order and not subject to the revisional powers of the High Court.

IN this case proceedings were instituted against one Damma under section 110 of the Code of Criminal Procedure. The Magistrate before whom those proceedings were, after holding an inquiry, discharged Damma under section 119 of the Code. At the same time he directed that the record of the case be laid before the District Magistrate with the request that Damma, who was the head-man of his village, might be removed from his office, and that the District Magistrate might, if necessary, direct the police to watch the movements of Damma. The District Magistrate accepted the Deputy Magistrate's recommendation and dismissed Damma from his post as head-man and also directed the

* Criminal Revision No. 143 of 1907.

(1) (1887) I. L. R., 9 All., 333. (2) (1871) 16 W. R., C. R., 230.

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police to watch and report upon his movements. Damma applied to the High Court in revision.

Mr. *R. Malcomson*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), in support of the order.

BANERJI, J.—This is an application for the revision of an order passed by Babu Surajbhan Prasad, Magistrate of the first class of Fatehpur. The learned Assistant Government Advocate raises a preliminary objection that the application is not maintainable under the Code of Criminal Procedure. The facts were these:—Proceedings were instituted against the applicant Damma under section 110 of the Code of Criminal Procedure. The Magistrate after holding an inquiry discharged Damma under section 119 of the Code. At the same time he directed the record of the case to be laid before the District Magistrate with the request that Damma, who was the head-man of the village, might be removed from that office, and that the District Magistrate might, if necessary, direct the police to watch the movements of Damma. Mr. *Malcomson* who appears for the applicant informs me that it is this order relating to the dismissal of Damma from the office of head-man and to his conduct being watched by the police that he complains of. I may mention that upon the papers being laid before the District Magistrate he made an order dismissing Damma from the office of head-man and directing the police to watch and note the acts of Damma and make a report, if necessary, to him. It is clear that the order is an executive order passed by the District Magistrate in his executive and not in his judicial capacity. When the subordinate Magistrate who heard the case under section 110 of the Code of Criminal Procedure ordered the discharge of Damma, that case came to an end. In directing the papers of the case to be laid before the District Magistrate with a certain recommendation he did so, not in his capacity of a Criminal Court, but as a subordinate of the District Magistrate, with a view that the District Magistrate might, if he thought fit, take action against the head-man of the village. The rules framed by the Local Government under section 45 (3) of the Code of Criminal Procedure authorize a District Magistrate to appoint and dismiss a

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head-man. The order of the District Magistrate dismissing the applicant is an executive order, and so is the order directing the police to watch his conduct. This latter order was apparently passed by the District Magistrate as the executive head of the police. I am unable to hold that the order made by the District Magistrate can be regarded as proceedings of an inferior Criminal Court within the meaning of section 435 of the Code of Criminal Procedure. The portion of the order of the Subordinate Magistrate of which the applicant complains was, as pointed out above, clearly not a judicial order. The application to this Court for revision of that order and of the order of the District Magistrate is not therefore maintainable. I accordingly dismiss it.

Before Mr Justice Dillon.

1907
April, 11.

EMPEROR *v.* MEHDI HASAN.*

Act No. XLV of 1860 (Indian Penal Code), sections 425, 426—Definition—Mischief—Act (Local) No. I of 1900 (N.-W. P. and Oudh Municipalities Act), section 167.

Certain cattle belonging to one M. H. upon various occasions when in charge of a servant of M. H. strayed, or were driven, into the Government Gardens at Saharanpur and there caused damage. *Held* that M. H., could not on these facts be convicted of the offence of mischief. *Forbes v Grish Chunder Bhattacharjee* (1) and *Empress v. Bai Baya* (2) followed. *Held* also that section 167 of the Municipalities Act, 1900, did not apply, that section being one dealing with offences against the person. *King Emperor v. Fatan Dra* (3) followed.

On the 13th of October 1906 certain cattle belonging to one Mehdi Hasan were found straying in the Government Gardens at Saharanpur and were sent to the pound. As the cattle had done considerable damage, and as it was not the first time that these cattle had been found trespassing in the Government Gardens, proceedings were taken against their owner under section 167 of the Municipalities Act. These proceedings ended in the conviction of Mehdi Hasan under section 426, and he was fined Rs. 25. Mehdi Hasan applied to the Sessions Judge to revise this order, and the Judge referred the case to the High Court under the provisions of section 438 of the Code of Criminal Procedure. Notice was also issued to Mehdi Hasan to show cause why his conviction

* Criminal Reference No. 157 of 1907.

(1) (1870) 14 W. R., 81. (2) (1883) I. L. R., 7 Bom., 126.
(3) Weekly Notes, 1905, p. 19.

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should not be altered to one under section 167 of Local Act No. I of 1900.

Mr. *M. L. Agarwala*, in support of the reference.

The Assistant Government Advocate (Mr. *W. K. Porter*) for the Crown.

DILLON, J.—This is a reference by the Sessions Judge of Saharanpur recommending that the conviction and sentence passed upon one Mehdi Hasan under section 424, Indian Penal Code, be set aside. Syed Mehdi Hasan was prosecuted before a Magistrate of the first class, Saharanpur, under section 167 of the Municipalities Act No. I of 1900. That section punishes the wilfully letting loose any horse or other animal so as to cause, or negligently allowing any horse or other animal to cause injury, danger, alarm or annoyance to any person, or suffering any ferocious dog to be at large without a muzzle. The facts of this case are these:—On the morning of October 13th, 1906, a number of cattle including Bramini bulls, cows and calves, were found straying in the Government garden. They had done a considerable amount of damage and were sent to the pound. They were the property of Mehdi Hasan, or at all events the cows and calves were his property. It is clear that this was not the first time that these cattle were found trespassing in the garden. Mehdi Hasan admits this, but pleads that the fault lay with his servant. The prosecution, which had been started with the sanction of the Chairman of the Municipal Board, ended in a conviction under section 426, Indian Penal Code, and a fine of Rs. 25. On the record being received in this Court notice was issued to Mehdi Hasan to show cause why his conviction under section 426 should not be altered to one under section 167 of Act No. I of 1900. In my opinion there can be no doubt that the conviction under section 426, Indian Penal Code, is bad. From the provisions of section 425, Indian Penal Code, which defines mischief, it is clear that there must be an intention to cause wrongful loss or damage. There is no evidence in this case that Mehdi Hasan caused the cattle to go into the garden at all much less that such was his intention. Following the rulings in *Major Forbes* v. *Grish Chunder Bhuttacharjee* (1) and *Empress* v. *Bai Baya* (2) I set aside the conviction and sentence of Mehdi Hasan

(1) (1870) 14 W. R., 31. (2) (1888) I. L. R., Bom., 126.

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under section 426, Indian Penal Code. The fine, if paid will be refunded. I have now to deal with the rule which was issued to Mehdi Hasan by this Court on the 19th of April 1907 calling upon him to show cause why his conviction should not be altered to one under section 167 of Act No. I of 1900. I am clearly of opinion that that section is even less applicable to the facts of this case than section 426. That section deals with offences against the person and has nothing to do with offences against property. This is clear from the section itself. Were any authority needed I would refer to *King Emperor* v. *Patan Din* (1) as exactly in point. The rule is discharged.

APPELLATE CIVIL.

1907

May 14.

Before Mr. Justice Banerji.

BAKHTWAR MAL (PLAINTIFF) v. ABDUL LATIF (DEFENDANT)*

Civil Procedure Code, section 424—Suit against public officer—Suit to recover articles seized by police during a search.

The plaintiff sued to recover from the defendant three account books which he alleged that the defendant, a Sub-Inspector of Police, had seized during a search, apparently in pursuance of the provisions of section 165 of the Code of Criminal Procedure, of the plaintiff's house. *Held* that the defendant, if he seized the books, which was denied, did so in his capacity as a police officer, and that the suit was not maintainable in the absence of the notice prescribed by section 424 of the Code of Civil Procedure. *Muhammad Sadiq Ahmad* v. *Ranna Lal* (2) distinguished. *Jogendra Nath Roy Bahadur* v. *Price* (3) referred to.

THE plaintiff in this case sued for the recovery of three account books. He alleged in his plaint that the defendant, who was a Sub-Inspector of Police, had searched his house and carried away these books amongst other property, and that at the trial of the case against the plaintiff the Sub-Inspector was asked to produce these books, but refused to do so, stating that he had not taken them. The Court of first instance (Munsif of Deoband) dismissed the suit upon the ground that the notice prescribed by

* Second Appeal No. 1240 of 1905, from a decree of G. C. Badhwar, Esq., Additional District Judge of Saharanpur, dated the 24th of November 1905, confirming a decree of Pandit Kunwar Bahadur, Munsif of Deoband, dated the 14th of September 1905.

(1) Weekly Notes, 1905, p. 19. (2) (1903) I. L.R., 26 All., 220.
(3) (1897) I. L. R., 24 Calc., 584.

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section 424 of the Code of Civil Procedure had not been served upon the defendant, and on appeal this decree was confirmed by the Additional District Judge. The plaintiff appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Mr. *A. E. Ryves*, for the respondent.

BANERJI, J.—The suit out of which this appeal has arisen was brought by the appellant against a Sub-Inspector of Police for recovery of possession of three account books. It has been dismissed on the ground that the notice required by section 424 of the Code of Civil Procedure was not served on the defendant before institution of the suit. The allegations of the plaintiff are these. The defendant in his capacity as a Sub-Inspector of Police searched the plaintiff's house and carried away several articles including jewellery and these account books; that at the trial of the case he was asked to produce the account books, but he refused to produce them, alleging that he had not taken them. The present suit was therefore brought for recovery of the account books. It is clear on the plaintiff's own allegation that when the defendant searched the plaintiff's house he did so in the capacity of a public servant. In seizing the account books (assuming that he seized them) he also acted in the same capacity apparently in pursuance of the provisions of section 165 of the Code of Criminal Procedure. The suit is therefore a suit against a public officer and in respect of an act purporting to have been done by him in his official capacity, and the defendant was entitled to a notice under section 424 of the Code of Civil Procedure. This case is distinguishable from that of *Muhammad Siddiq Ahmad* v. *Panna Lal* (1) to which the learned vakil for the appellant referred. The circumstances of that case are quite different, the defendant having acted in that case, not in his capacity as a public officer, but illegally and in bad faith. The case more in point is that of *Joyendra Nath Roy* v. *Price* (2), in which it was held that a notice was necessary under similar circumstances. I dismiss the appeal with costs.

Appeal dismissed.

(1) (1903) I. L. R., 26 All., 220. (2) (1897) I. L. R., 24 Calc., 584.

REVISIONAL CRIMINAL.

1907
May, 15.

Before Mr. Justice Dillon.

EMPEROR *v.* HUSAIN BAKHSH AND OTHERS.*

Act No. XLV of 1860 *(Indian Penal Code), section* 153—*Definition—"Wantonly"—Act No V of* 1861 *(Police Act), section* 30—*Disobedience to orders of police as to conduct of a procession.*

Where certain persons taking part in a religious procession gratuitously disobeyed the orders of the police concerning the manner in which such procession was to be conducted, with the result that a riot was only averted by bringing armed police upon the scene, it was *held* that the persons concerned acted—though not "malignantly"—yet "wantonly" within the meaning of section 153 of the Indian Penal Code, and were properly convicted under that section

Held also that a conviction under section 153 of the Indian Penal Code does not warrant the taking of action under section 106 of the Code of Criminal Procedure.

On the 5th of April 1907, which was the *chehlum*, or 40th day of the Moharram, the *qasais* and *sikligars* of Shahjahanpur started with *tazias* for the local *karbala*. A police order had been issued that day that all the *tazia* processions should arrive at a place called Ajan Chauki by 7 P.M., so as to reach the *karbala* at 10 P.M. As a matter of fact the *qasais* and *sikligars* did not start from the Chauki till 10 P.M. At the Chauki a dispute arose between the *qasais* and the *sikligars* as to which of them should go first. They were repeatedly ordered to move on, but instead of doing so, they proceeded to wrangle and abuse each other and it was with the utmost difficulty that they were induced to proceed. So also when the two parties had arrived at the *karbala* a dispute arose as to which *tazia* should go first. The *tazias* were ultimately buried at 2 A.M. not, however, before additional police had been summoned to prevent the two parties from coming to blows. Ten men of the two parties were arrested, tried for an offence under section 153 of the Indian Penal Code, convicted and sentenced to two months' rigorous imprisonment each by the District Magistrate. They were also bound over to keep the peace. From these convictions and sentences nine of the ten men applied in revision to the High Court.

* Criminal Revision No. 197 of 1907.

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Mr. *M. L. Agarwala*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

DILLON, J.—This is an application for revision of an order passed by the District Magistrate of Shahjahanpur convicting the nine petitioners under section 153 of the Indian Penal Code, and sentencing them to two months' rigorous imprisonment each. The District Magistrate also passed an order under section 106 of the Code of Criminal Procedure directing that all the accused at the expiration of their respective sentences should execute a bond to keep the peace for one year in their own recognizance for Rs. 200 with two sureties of Rs. 100 each. The facts which gave rise to this conviction are these:—On or about the 5th of April last, which was the *chehlum*, that is, the 40th day of the Moharram, the *qasais* and *sikligars* of Shahjahanpur started with *tazias* for the local *karbala*. A police order had been issued that day that all the *tazia* processions should arrive at Ajan Chauki by 7 P.M. so as to arrive at the *karbala* at 10 P.M. As a matter of fact the *qasais* and *sikligars* did not start from the Chauki till 10 P.M. At the Chauki a dispute arose between the *qasais* and *sikligars* as to which of them should go first. They were repeatedly ordered to move on, but instead of doing so, they proceeded to wrangle and abuse each other, and it was with the greatest difficulty that they were ultimately got to move on. Similarly when the two parties had arrived at the *karbala* a dispute arose as to which *tazia* should go first. The *tazias* were however buried by 2 A.M. and the nine petitioners and a 10th man who has not applied for revision were arrested under the orders of Pandit Jagmohan Nath, Deputy Magistrate, and were charged on these facts with "giving provocation by wantonly doing an illegal act knowing it to be likely that such provocation will cause the offence of riot to be committed." The District Magistrate holds that the petitioners' action in refusing to move on with their *tazias* when ordered to do so and wrangling on the question of precedence was calculated to cause a serious riot. In this view I entirely agree. It has been argued before me that the accused committed no offence under section 153 of the Indian Penal Code, as they did not "maliguantly or wantonly" refuse to

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move on. It is not the case for the prosecution that they acted maliguantly and the word "wantonly" as used in the section merely means "recklessly." I think that the evidence and the finding clearly show that the petitioners acted recklessly in refusing to move on when ordered to do so, and that they, in wrangling and abusing each other when they were all in an extremely excited condition and armed with lathis, acted wantonly within the meaning of section 153 of the Indian Penal Code. I think that these convictions must be affirmed. With regard to the order under section 106 of the Code of Criminal Procedure, I do not think that the offence of which the petitioners have been convicted would bring them within the purview of that section. I therefore set aside that order. As to the sentences passed, I think that the imprisonment already undergone by the nine petitioners is sufficient to meet the ends of justice. I therefore remit the remaining portion of their sentences. Although Altaf Mian has not applied to this Court in revision, as I have the record before me I proceed to deal with his case also. I direct that he suffer rigorous imprisonment for two months in lieu of the sentence which was passed upon him by the District Magistrate. In his case also the order under section 106 of the Code of Criminal Procedure is set aside. Subject to these modifications the application of the nine petitioners before me is rejected.

APPELLATE CIVIL.

1907
May 15.

Before Mr. Justice Aikman.

KUNNI LAL AND OTHERS (DEFENDANTS) *v.* KUNDAN BIBI (PLAINTIFF).*

Act No. V of 1882 *(Indian Easements Act), sections* 15 *and* 28 *(c)—Easement—Prescriptive right to light and air—Infringement of right—Actual damage.*

Where a plaintiff is claiming relief upon the ground that his prescriptive right to the passage of light and air to a certain window has been interfered with, it is enough to show that the right has in fact been interfered with. The plaintiff is not obliged to go further and show that he has suffered actual damage thereby. *Colls* v. *Home and Colonial Stores, Ltd.* (1) and *Kuar* v. *Jolly*

* Second Appeal No. 92 of 1906, from a decree of G. A. Paterson, Esq., District Judge of Benares, dated the 24th of August 1905, modifying a decree of Babu Hira Lal Singh, Munsif of Benares, dated the 12th of April 1905.

(1) 1904, A. C., 179.

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(1) not applied. *Nandkishor Balgovan* v. *Bhagubhai Pranvallabhdas* (2) referred to.

THE plaintiff sued for injunction against the defendants ordering them to demolish certain constructions which they had made, and which, according to the plaintiff, had blocked up a window and two sky-lights in her house. The court of first instance (Munsif of Benares) decreed the plaintiff's claim.

On appeal the District Judge after an inspection of the locality found that the constructions made by the defendants entirely blocked up the window and blocked up all but a minute portion of one of the sky-lights. He accordingly found the plaintiff entitled to an order for the removal of so much of the constructions as blocked up the window and the sky-lights. The defendants appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants.

Munshi *Gokul Prasad*, for the respondent.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff respondent against her neighbours, the defendants, in which she asked for an injunction ordering the defendants to demolish certain constructions which they had made, and which according to the plaintiff's case, had blocked up a window and two sky-lights in her house. Other reliefs were claimed, but in this appeal we are only concerned with the first relief asked for, namely, in regard to the closing of the window and the two sky-lights. The learned District Judge after an inspection of the locality found that the construction made by the defendants entirely blocked up the window and blocked up all but a minute portion of one of the sky-lights. He accordingly found the plaintiff entitled to an order for the removal of so much of the construction as blocked up the window and the sky-light. In appeal to the lower Court it was contended that the plaintiff had not acquired any right of easement in respect of the openings so blocked up, but this ground is no longer urged before me. The only plea argued—and argued with much ability by the learned advocate for the defendants appellants—is that on the finding of the District Judge, to the effect that "from what he saw little or no harm had been done," the decree which

(1) 1905, 1 Ch., 480. (2) (1883) I. L. R., 8 Bom., 93.

he passed was wrong in point of law. In support of his argument the learned advocate referred to the decisions in *Colls* v. *Home and Colonial Stores, Ld.* (1) and *Kune* v. *Jolly* (2). These decisions would have a distinct bearing on this case were not the matter covered, as I hold it to be, by the provisions of the Indian Easements Act. Section 15 of that Act provides that where the access and use of light and air to and for any building have been peaceably enjoyed, as an easement, without interruption and for 20 years the right to such access and use of light or air shall be absolute. Again section 28 *(c)* provides that the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespective of the purposes for which it has been used. The latter definition of the extent of a prescriptive right to light and air is not in accord with the English law as laid down in recent decisions, but I must be guided by the statutory law. On the finding that there was an interference with the prescriptive right which the plaintiff had acquired, she was entitled to the decree passed by the learned Judge. I may also point out that this was not a case of mere obstruction, but one opening was entirely and the other almost entirely blocked up. The case is apparently similar to that which was before the Bombay High Court in *Nandkishor Balgovan* v. *Bhagubhai Pranvalabhdas* (3). The learned advocate for the appellants also contended that this was a case in which a decree for damages might have been passed. No such plea was taken in the Court below and there is no plea to that effect in the memorandum of appeal before me and I decline to entertain it.

For the above reasons I must hold that the appeal fails, and I dismiss it with costs.

Appeal dismissed.

(1) 1904, A. C., 179. (2) 1905, 1 Ch., 480.
(3) (1883) I. L. R., 8 Bom., 95.

1907
May 17.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

BETI JEO (PETITIONER) v. SHAM BIHARI LAL (OPPOSITE PARTY).*

Civil Procedure Code, section 108—Decree ex parte—Application to set aside decree—Right of representative to continue proceedings initiated by defendant.

Where proceedings under section 108 of the Code of Civil Procedure have been initiated by the defendant the legal representative of the defendant is entitled to continue such proceedings *Janki Prasad* v. *Sukhrani* (1) distinguished. *Ganoda Prasad Roy* v. *Shib Narain Mukerjee* (2) referred to.

MUSAMMAT Duni Kunwar, against whom an *ex parte* decree had been passed on the 19th of March 1906, applied on the 18th of April 1906 under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside and the case restored. The plaintiff filed objections, alleging that the applicant had died on the day when her application was filed and that for this and other reasons the application should fail. On the 19th May 1906 the original applicant's daughter Musammat Beti Jeo was brought on to the record in place of her mother. On the 9th of June 1906 the Subordinate Judge dismissed the application, holding that it could not be proceeded with after the death of Musammat Duni Kunwar. Musammat Beti Jeo appealed to the High Court.

Messrs. *W. Wallach*, and *M. L. Agarwala* and Munshi *Gulzari Lal*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the respondent.

KNOX, ACTING C. J., and RICHARDS, J.—The only question which arises in this appeal is whether the legal representative of a deceased judgment-debtor is entitled to continue an application made by her predecessor in title under section 108 of the Code of Civil Procedure to set aside an *ex parte* decree. It is urged on behalf of the respondent that under the ruling of *Janki Prasad* v. *Sukhrani* (1), the legal representative has no such right. In that case it was held that where a defendant had died after an *ex parte* decree had been made, his personal representative could

* First Appeal No. 107 of 1906, from an order of Babu Ishri Prasad, Subordinate Judge of Mainpuri, dated the 9th of June 1906.

(1) (1899) I. L. R., 21 All., 274. (2) (1901) I. L. R., 29 Calc., 33.

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not apply under section 108 because the right given under section 108 is a right personal to the defendant and does not pass to his representative. This decision was considered by the Calcutta High Court in the case of *Gunada Prasad Roy v. Shib Narain Mukerjee* (1). The Court would naturally lean toward giving as wide a construction as possible to section 108 so as to give the benefit conferred by that section on the defendant to his representative to contest the decree passed *ex parte* against the deceased. The case differs from the case of *Janki Prasad v. Sukhrani*, because in the present case the application was made during the life-time of the deceased defendant to set aside the decree. She died before any order could be made and the decree-holders gave notice to the present appellant and, in that sense, themselves brought her on to the record. Under these circumstances it is unnecessary to say anything more upon the authority cited in support of the respondent's proposition than that it does not apply to the present case. We allow the appeal, set aside the order of the Court below, and send the case back to the Court below for proceeding according to law. Costs will abide the event.

REVISIONAL CRIMINAL.

1907

May 27.

Before Mr. Justice Aikman and Mr. Justice Griffin.

EMPEROR v. PARSIDDHAN SINGH AND OTHERS.*

Act No XLV of 1860 (Indian Penal Code), section 225—Criminal Procedure Code, sections 59 and 60—Rescue from lawful custody—Definition

A private person lawfully arrested a thief in the act of committing theft and made him over to a village chaukidar to be taken to the nearest police station. On the way to the police station three persons seized the chaukidar, and the thief made his escape. *Held* that the rescuers were rightly convicted under section 225 of the Indian Penal Code. The arrest of the thief having been in the first instance lawful, the requirements of section 59 of the Code of Criminal Procedure were sufficiently complied with by the person arresting sending him to the police station in the custody of the chaukidar. *Queen-Empress v. Potala* (2) followed. *King-Emperor v. Jokri* (3) referred to.

THE facts out of which this case arose were as follows: One Mahabir caught a man called Dukhi in the act of stealing his jack fruit. Mahabir arrested Dukhi and made him over to the village

* Criminal Revision No. 188 of 1907.

(1) (1901) I. L. R., 29 Calc., 33. (2) (1888) I. L. R., 10 Mad., 480.
(3) (1901) I. L. R., 23 All., 260

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chaukidar to be taken to the police station. After the chaukidar and his captive had got a short distance on their way, Parsiddhan Singh and two other men followed them up from the village, seized hold of the chaukidar and made him release Dukhi, who ran off. The rescuers were charged before a Magistrate of the first class with the offence provided for by section 225 of the Indian Penal Code, were convicted, and were sentenced to two months' rigorous imprisonment each. From these convictions and sentences they appealed to the Sessions Judge, who dismissed the appeals. An application was then made to the High Court in revision, where it was contended that the custody of the chaukidar was not lawful, it being the duty of a private person making an arrest in accordance with section 59 of the Code of Criminal Procedure to "take" the person arrested to the police station. The chaukidar was not himself authorized to make the arrest, not having seen the person arrested committing any offence. The applicants were therefore not guilty of effecting any rescue from a lawful custody.

Mr. *M. L. Agarwala*, for the appellants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

AIKMAN and GRIFFIN, JJ.—This is an application for the revision of a judgment of a Magistrate of the first class convicting the three applicants of an offence punishable under section 225 of the Indian Penal Code and sentencing them to two months' rigorous imprisonment each. The convictions and sentences were affirmed on appeal by the learned Sessions Judge. The following are the facts of the case. One Mahabir caught a man called Dukhi in the act of stealing his jack fruit. Mahabir arrested him and made him over to the village chaukidar for conveyance to the police station. When the chaukidar and Dukhi had gone a short distance, the accused, according to the evidence, followed them up from the village, seized hold of the chaukidar and made him release Dukhi, who ran off. The case for the applicants has been ably argued by the learned counsel who appears on their behalf. After hearing him and the Assistant Government Advocate in support of the conviction we are of opinion that no sufficient ground has been made out for

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interference in revision. The powers of village chaukidars as to arrest are regulated by the provisions of Act No. XVI of 1873. It is clear from section 8 of that Act that in the present case the chaukidar himself had no power to make an arrest as he had not found Dukhi in the act of committing any of the offences specified in that section. But it is equally clear from the provisions of section 59 of the Code of Criminal Procedure that Mahabir had power to make the arrest, inasmuch as Dukhi was in his view committing a non-bailable and cognizable offence. Section 59 directs that when a private person in the exercise of the right conferred by that section arrests any one "he shall without unnecessary delay make over the person so arrested to a police officer or in the absence of a police officer take such person to the nearest police station." The learned counsel points out the difference in the language of the section as compared with that used in section 60. In the latter section it is provided that a police officer making an arrest under the powers conferred on him by law "shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case or before the officer in charge of the police station." It is ingeniously argued that as in section 60 we find the words "take or send" and in section 59 the word "take," the inference is that a private person making an arrest must himself take the person to the nearest police station if there is no police officer present to whom he can make over the person arrested. We are, however, unable to hold that it was the intention of the Legislature to impose such an onerous duty on private persons, a duty which in many instances it would be impossible for them to discharge. It may be that the Legislature used the expression "take or send" in section 60 as it might be supposed that in the case of a police officer it would be his duty when he makes an arrest himself to convey the person arrested before a Magistrate, and in order to provide for the inconvenience which might arise from this gave special power to police officers to delegate the duty to another; but we do not think that in the case of an arrest by a private person there would, *prima facie*, be any inference that he himself was to act as a police officer and convey the person he had arrested to

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the nearest police station. The question before us was considered in the case *Queen-Empress* v. *Poladu* (1). In that case the learned Judges made the following observation in regard to the duties imposed on a private person under section 59 of the Code of Criminal Procedure:—"The direction that he shall make over the person arrested to a police officer without unreasonable delay is sufficiently complied with by his being forwarded in the custody of a servant or of the village servant as in this case. The intention is to prevent arrest by a private person on mere suspicion or information and not to impose on him the obligation of taking the party arrested in person to a police station. The original custody continued and did not terminate." In the case *King-Emperor* v. *Johri* (2), Blair, J., made the following remark:—"The question raised by the Government appeal as to whether a qualified person having made an arrest, and having then handed over the person arrested to the custody of an agent, such custody continues to be what it was originally, a lawful custody, is one which I should be disposed to answer in the affirmative in accordance with the ruling in *Queen-Empress* v. *Poladu* if it were necessary to do so." In the same case one of us remarked as follows:—"Had the arrest by Mstabhik been lawful, I should have had little difficulty in holding, in accordance with the Madras High Court (see the case cited by my learned colleague) that the escape from the chaukidar's custody was an offence under section 224. But it is unnecessary to decide this point." These observations, it is true, were *obiter*, but we see no sufficient ground to dissent from them and from the law as laid down in the Madras case. We hold then that Mahabir sufficiently complied with the law when he made over Dukhi to the village chaukidar to be taken to the police station; that the village chaukidar was his agent for discharging the duty imposed on him by law, and that therefore Dukhi was at the time when he was rescued "lawfully detained" within the meaning of section 225 of the Indian Penal Code. The result is that we see no sufficient ground for disturbing the convictions. The applicants have been released on bail. We have examined the record. We note that the theft for which Dukhi was arrested was one of

(1) (1888) I. L. R., 11 Mad., 480. (2) (1901) I. L. R., 23 All., 286.

a petty nature, and that in affecting his rescue from the chaukidar the applicants did not use violence, but were only guilty of a technical assault. The applicants have been in jail for upwards of six weeks, and this we think a sufficient punishment. Therefore, whilst affirming the convictions, we reduce the terms of imprisonment imposed on the accused to the terms already undergone. The result is that the bail upon which the applicants have been enlarged is discharged and they need not surrender.

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EMPEROR v. PARSEDHAN SINGH.

APPELLATE CIVIL.

1907 *May* 27.

Before Mr. Justice Aikman and Mr. Justice Griffin.

RAM LAL (PLAINTIFF) *v.* GHULAM HUSAIN AND ANOTHER (DEFENDANTS).*

Act No XV of 1877 *(Indian Limitation Act), schedule II, articles* 48, 90, 115, 120—*Limitation—Suit to recover money given to defendant to be delivered to a third person.*

A. gave Rs 300 to B. in order that it might be delivered to C, who had, a few days previously, executed a mortgage in favour of A. B. also executed a bond guaranteeing the repayment of the loan by C On suit by A against B. and C., which was decided on the 15th of January 1901, it was discovered that B. had never paid the money to C. On the 1st of December 1904 A. sued B. to recover the Rs 300 paid to him as above described *Held* that the rule of limitation applicable was that provided for by article 48, if not by article 90 or 115 of the Indian Limitation Act, 1877, and the suit was time-barred. *Ramshar Chauhey* v. *Mata Bhikh*, (1) referred to.

THE facts out of which this appeal arose are as follows:—

On the 12th of April 1894 the plaintiff Ram Lal made over to the defendant Ghulam Husain a sum of Rs. 300 to be paid over to one Narotam. The plaintiff took from Ghulam Husain a stamped receipt. The money was to be lent to Narotam on the security of a mortgage which Narotam had executed in plaintiff's favour five days previously. Ghulam Husain also executed in favour of the plaintiff a bond guaranteeing repayment by Narotam of this loan of Rs. 300. On the 23rd of February 1900 the plaintiff sued both Narotam and Ghulam Husain to recover this

*Second Appeal No 664 of 1905, from a decree of L H Turner, Esq., District Judge of Shahjahanpur, dated the 25th of April 1905, confirming a decree of Babu Nihal Chander, Subordinate Judge of Shahjahanpur, dated the 6th of January 1905

(1) (1883) I. L. R., 5 All., 341.

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advance on the basis of the mortgagee-deed and the security bond. The suit was ultimately dismissed as against both the defendants. In that suit it was found that Ghulam Husain had never handed over the Rs. 300 to Narotam. That suit was decided on the 15th of January 1901. On the 1st of December 1904, that is, nearly four years afterwards, the plaintiff brought the suit out of which this appeal arises to recover from Ghulam Husain the Rs. 300 with interest. The suit was dismissed by the Court of first instance (Subordinate Judge of Shahjahanpur), and this decree was confirmed on appeal by the District Judge. The plaintiff thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Mr. *G. W. Dillon*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

AIKMAN and GRIFFIN, JJ.— We are of opinion that this appeal must fail. On the 12th of April 1894 the plaintiff Ram Lal made over to the defendant Ghulam Husain a sum of Rs. 300 to be paid over to one Narotam. The plaintiff took from Ghulam Husain a stamped receipt. The money was to be lent to Narotam on the security of a mortgage which Narotam had executed in plaintiff's favour five days previously. Ghulam Husain also executed in favour of the plaintiff a bond guaranteeing repayment by Narotam of this loan of Rs. 300. On the 23rd of February 1900 the plaintiff sued both Narotam and Ghulam Husain to recover this advance on the basis of the mortgage-deed and the security bond. The suit was ultimately dismissed as against both the defendants. In that suit it was found that Ghulam Husain had never handed over the Rs. 300 to Narotam. That suit was decided on the 15th of January 1901. On the first of December 1904, that is, nearly four years afterwards, the plaintiff brought the suit out of which this appeal arises to recover from Ghulam Husain the Rs. 300 with interest. The suit was dismissed by the learned Subordinate Judge and his decree was confirmed on appeal by the learned District Judge. The plaintiff comes here in second appeal.

The first difficulty in the plaintiff's way is one of limitation. On the plaintiff's behalf it is contended that no article of the Limitation Act applies and that the suit is within time under

section 120 of the Limitation Act, having been brought within six years from the time when he became aware of Ghulam Husain's misfeasance. In our opinion this plea cannot prevail. It has been held by this Court in a somewhat similar case, namely, *Rameshar Chaubey* v. *Mata Bhikh* (1) that a suit like the present falls within article 48 of the second schedule to the Limitation Act. That provides a period of three years for a suit for specific moveable property lost by dishonest misappropriation or conversion or for compensation for the same, the time to run from the date when the person having a right to the possession of the property first learns in whose possession it is. It may be open to argument whether a suit for money could properly be considered to be a suit for "specific moveable property," but we are bound by that decision. Moreover, if article 48 does not apply, the present suit might be held to fall within article 90, which covers the case of suits by principals against agents for neglect or misconduct, and allows a period of three years within which to sue from the time when the neglect or misconduct becomes known to the plaintiff. It might fairly be contended that in this case Ghulam Husain was the plaintiff's agent for the purpose of handing the money over to Narotam. Or the suit might possibly fall within article 115, which provides a period of three years for a suit "for compensation for the breach of any contract, expressed or implied, not in writing and registered and not herein specifically provided for." In this case it might be said that there was an implied contract on the part of Ghulam Husain to hand over the money to Narotam.

In any view the suit was in our opinion time-barred when it was brought. The result is that we dismiss the appeal with costs.

Appeal dismissed.

(1) (1883) I. L. R., 5 All., 341.

1907
April 16.

APPELLATE CIVIL

Before Mr. Justice Sir George Knox.

ABDUL RAHMAN AND OTHERS (PLAINTIFFS) *v.* BHAGWAN DAS AND OTHERS (REPRESENTATIVES OF HARDEO SAHAI, DEFENDANT)*

Easement—Right of privacy—Defendant not allowed to give himself increased facilities for overlooking plaintiff's zenana.

Held that the fact that the plaintiffs' *zenana* house might be to some extent overlooked by persons standing on the roof of the defendants' house was no justification for the defendant's opening fresh doors or windows in the wall of their upper storey looking towards the plaintiffs' house, whereby the plaintiffs' house might be overlooked without the person inspecting it being visible to the occupants of that house. *Gokal Prasad* v. *Radho* (1) referred to.

THE defendant purchased a house in the city of Meerut opposite to one owned by the plaintiffs and used by them as a zenana house. When the defendant purchased the house it had one storey only, but after a time the defendant began to add a second storey. He built a wall on the side of the plaintiffs' house and was putting in a door and two windows when the plaintiffs sued for an injunction to compel the defendant to block up the door and windows upon the ground that they were an interference with the plaintiffs' right of privacy. The court of first instance (Additional Munsif of Meerut) found that there had been no substantial interference with the plaintiffs' right of privacy, if any in fact existed, and accordingly dismissed the suit, and this decree was affirmed in appeal by the Additional District Judge. The plaintiffs thereupon appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the respondents.

KNOX, J.—The plaintiffs and the defendant in this case are inhabitants of houses which lie opposite the one to the other. The defendant respondent has recently purchased the house, which was confined to one storey. He has begun to add to that house by constructing a second storey, and in the wall of the

* Second Appeal No. 639 of 1905, from a decree of E. A. Kendall, Esq., Additional District Judge of Meerut, dated the 9th of April 1905, confirming a decree of Behari Lal Mesh, Esq., Additional Munsif of Meerut, dated the 11th of August 1904.

(1) (1888) I. L. R., 10 All., 368.

second storey which overlooks the plaintiffs' *zenana* he has pierced a door and two windows. The plaintiffs, alleging that by this act the defendant has invaded the right of privacy of the *purdah-nashin* ladies of their house, have brought this suit, praying that the defendant may, by a perpetual injunction, be restrained from opening towards the house of the plaintiffs any door or window in the northern wall of the upper storey of his house, and that a certain door frame, which he has already put up, may be removed. The defence is to the effect that before the defendant began to build, the plaintiffs' *zenana* was overlooked by the roof of the defendant's house, and that whatever right of privacy may exist in favour of the plaintiffs is a right which has not been substantially and materially interfered with by the action of the defendant. If the defendant's action has in any way affected the plaintiffs' right of privacy, it has virtually increased and not diminished that privacy. Both the Courts below have accepted this defence and held that it has not been proved that the defendant has intruded upon the privacy of the plaintiffs, but, on the other hand, has shut up all prospect except so much as may be seen from the places where the door and the windows have been opened. The plaintiffs having lost their suit in both the Courts below appeal to this Court and take the plea that the construction of the walls and doors makes the appellants' position worse, inasmuch as there is a greater apprehension now of the respondents using his second storey to the prejudice of the appellants' right of privacy.

In support of this plea the case of *Gokal Prasad* v. *Radho* (1) has been put forward. Particular stress has been laid upon the judgment of the learned Chief Justice, Sir John Edge. That portion is to be found at page 387, where a similar contention was raised to the effect that as the other portion of the house and part of the courtyard were overlooked from the houses of other people, there could be no substantial interference with any privacy of the plaintiffs' house. The learned vakil for the respondent also takes his stand upon the same judgment and points out that the learned Chief Justice held that every case of this kind must be governed by its particular facts. The primary question will be,

(1) (1888) I. L. R., 10 All., [illegible]

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ABDUL RAHMAN v. BHAGWAN DAS.

does the privacy in fact and substantially exist, and has it been and is it in fact enjoyed? If it is found that it did substantially exist and was enjoyed, the next question would be was that privacy substantially or materially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against those acts? It is now admitted by both sides that in the town of Meerut, where these houses are situate, there is a local custom in favour of privacy, and all that I have to consider is, whether that privacy has been substantially or materially interfered with. At first sight it would seem that it had not been, but on giving the case my full consideration, I am inclined to the view that from an Indian point of view, there is a great deal to be said in favour of the right of privacy being more substantially and materially invaded by apertures which would permit a person to look on without being observed than by the existence of an open surface where the presence of a looker-on would at once be conspicuous and could easily be guarded against. Viewed in this light the acts of the defendant are clearly a substantial and material invasion of the right of privacy of the plaintiffs. I decree the appeal, set aside the decrees of both the Courts below and decree the plaintiffs' claim with costs in all the Courts.

Appeal decreed.

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April 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

NAJM-UD-DIN AHMAD (DEFENDANT) *v.* ALBERT PUECH (PLAINTIFF).*

Civil Procedure Code, section 522—Arbitration—Award—Decree on award made without allowing time to file objections—Appeal.

An appeal will lie from a decree passed in accordance with an award if such decree has been passed without allowing to the parties the time prescribed by law for filing objections to the award *Ibrahim Ali* v. *Mohun Ali* (1) and *Maharajah Joymungul Singh Bahadur* v. *Mohun Ram, Marwaree* (2) followed.

THE suit out of which this appeal arose was for an account of partnership dealings, and was referred to arbitration on the 20th of June 1905. On the 14th of November 1905, an award was made and the 25th of November was fixed for the disposal of the

* Second Appeal No. 1031 of 1906, from a decree of Munshi Muhammad Ahmad Ali Khan, Additional District Judge of Meerut, dated the 7th of July 1906, confirming a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 25th of November 1905.

(1) (1886) I. L. R., 18 All., 422. (2) (1873) 23 W. R., 429.

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case, of which fact both parties were informed on the 14th of November. The defendant appellant applied for a copy of the award on the 23rd of November, but had not obtained the copy when the case came on for disposal on the 25th. He applied for an adjournment of the hearing, but his application was refused, and, despite the provisions of section 522 of the Code of Civil Procedure, which enables the Court to pass a decree upon the award only if no application has been made to set it aside and the time for making such application has expired, the Court of first instance passed a decree in the terms of the award. The defendant appealed, but his appeal was dismissed by the lower appellate Court (Additional District Judge of Meerut). The defendant accordingly appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellant.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal by a defendant against a decree passed upon an award, and is based on the contention that the Courts below had no jurisdiction to consider the award and give judgment in accordance with it until the period for applying to set aside the award prescribed by article 158 of schedule II to the Limitation Act, coupled with section 12 of the same Act, had expired. The suit was for an account of partnership dealings, and was referred to arbitration on the 20th of June 1905. On the 14th of November 1905, an award was made and the 25th of November was fixed for the disposal of the case, of which fact both parties were informed on the 14th of November. The defendant appellant applied for a copy of the award on the 23rd of November, but had not obtained the copy when the case came on for disposal on the 25th. He applied for an adjournment of the hearing, but his application was refused, and, despite the provisions of section 522 of the Code of Civil Procedure, which enables the Court to pass a decree upon the award only if no application has been made to set it aside and the time for making such application has expired, the Court of first instance passed a decree in the terms of the award. It is settled by the decision of a Full Bench of this Court in the case of *Ibrahim Ali* v. *Mohsin Ali* (1) that an appeal will lie in a case

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where an application to set aside an award on the ground of misconduct of the arbitrator was made and the Court passed its decree without considering the application, or where the Court has not allowed sufficient time to the parties to file objections to the award. This ruling followed an earlier ruling of the Privy Council in the case of *Maharajah Joymungul Singh Bahadur* v. *Mohun Ram, Marwaree* (2) and other cases of a similar nature. In that case the Calcutta High Court had set aside a decree passed upon an award on two grounds, the first being that the Judge had proceeded irregularly inasmuch as he had passed his decree without allowing the parties the ten days for filing objections to the award, which the Code of Civil Procedure allowed them to do. The other was that the award was altogether informal. Their Lordships of the Privy Council expressed their approval of the decision of the High Court in setting aside the decree on these grounds. It is unnecessary to refer to other decisions of a like nature. When a decree has been regularly passed upon an award under the provisions of section 522, no appeal lies from the decree except in so far as the decree is in excess of, or not in accordance with, the award. But before such a decree can be passed it is necessary for the Court to stay its hand until the time for making an application to set aside the award has expired. The Court is not to pass a decree upon an award until the time within which an application to set it aside has expired. Now the time allowed by article 158 for an application to set aside an award is ten days from the time when the award is submitted to the Court, but by section 12 of the Limitation Act, in computing the period of limitation for such application, the time requisite for obtaining a copy of the award is to be excluded. It is clear, therefore, in the present case that the time, within which the defendant appellant could have applied to have the award set aside, had not expired when the decree was passed. The decree was, therefore, premature, and consequently, notwithstanding the provision in section 522 that no appeal shall lie when a decree is in accordance with, and not in excess of, an award, the decree not being a legal decree, it is open to the party aggrieved by the action of the Court to maintain an appeal. We therefore allow

(1) (1896) I. L. R., 18 All., 422. (2) (1875) 23 W. R., 429.

the appeal, set aside the decrees of both the lower Courts and remand the suit to the Court of first instance, through the lower appellate Court, with directions that it be reinstated on the file of pending suits and be disposed of on the merits, an opportunity being given to the defendant appellant, if so advised, to apply to have the award set aside. We think that under all the circumstances the costs here and hitherto should abide the event. We order accordingly.

Appeal decreed and cause remanded.

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NAJM-UD-DIN AHMAD v. ALBERT PUECH.

REVISIONAL CRIMINAL.

1907
May 4.

Before Mr. Justice Dillon.

EMPEROR *v.* TULA.*

Act No. XLV of 1860 (Indian Penal Code), section 211—False charge—Practice—Opportunity to be given to prove charge before prosecuting.

Where it is intended to prosecute any person under section 211 of the Indian Penal Code such person ought to be given an opportunity of substantiating, if he can, the charge which he has brought before he is prosecuted. *Queen-Empress v. Ganga Ram* (1) and *Queen-Empress v. Raghu Tiwari* (2) followed.

THE facts of this case are as follows:—One Tula lodged a complaint of robbery against Rameshwar and another in the Court of a first class Magistrate of Garhwal. As Tula had already reported the matter to the Police, the Magistrate decided to await the police report before taking action on the complaint. The police report was to the effect that the complaint was false. Beyond examining the complainant at the time of recording his complaint the Magistrate took no further evidence in the case. On receiving the police report, the Magistrate dismissed the complaint under section 203 of the Code of Criminal Procedure. Tula was then called upon to show cause why he should not be prosecuted under section 211, Indian Penal Code. In showing cause, Tula said that beside other witnesses he relied upon those who had already been examined by the police. The Magistrate then passed an order, directing Tula to be prosecuted under section 211, Indian Penal Code, and sent the case to the District Magistrate for disposal. On the case coming before the

* Criminal Reference No. 178 of 1907.

(1) (1885) I. L. R., 8 All., 38. (2) (1893) I. L. R., 15 All., 386.

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District Magistrate objections were taken on behalf of Tula to the validity of the order directing his prosecution on the ground that Tula had been given no opportunity of proving his case.

DILLON, J.—In this case one Tula lodged a complaint of robbery against Rameshwar and another in the Court of a first class Magistrate of Garhwal. As Tula had already reported the matter to the police, the Magistrate decided to await the police report before taking action on the complaint. The police report was to the effect that the complaint was false. Beyond examining the complainant at the time of recording his complaint the Magistrate took no further evidence in the case. On receiving the police report, the Magistrate dismissed the complaint under section 203 of the Code of Criminal Procedure. Tula was then called upon to show cause why he should not be prosecuted under section 211, Indian Penal Code. In showing cause, Tula said that beside other witnesses he relied upon those who had already been examined by the police. The Magistrate then passed an order, directing Tula to be prosecuted under section 211, Indian Penal Code, and sent the case to the District Magistrate for disposal. On the case coming before the District Magistrate objections were taken on behalf of Tula to the validity of the order directing his prosecution on the ground that Tula had been given no opportunity of proving his case. The question, therefore, is whether the order of Mr. Dharmanand Joshi, Magistrate of the first class, Garhwal, dated 11th February 1907, above referred to, is a proper order or not. There is apparently no ruling of this Court directly on the point except one—*Queen-Empress* v. *Ganga Ram* (1) which lays down that an order under section 195 of the Code of Criminal Procedure directing the prosecution of the complainants for bringing a false charge under section 211, Indian Penal Code, should not have been made until the complainants had been afforded an opportunity of proving their case. In *Queen-Empress* v. *Raghu Tiwari* (2) it was held that in a case like that under consideration, "the Court should, in our opinion, as a rule, proceed to determine such criminal proceeding instituted in it and should give the person instituting such proceeding a reasonable opportunity of supporting his case before proceeding

(1) (1886) I. L. R., 8 All., 38. (2) (1893) I. L. R., 15 All., 335.

against him for an offence under section 211." Following these rulings I hold that the order in question was not a proper order. I therefore set it aside.

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EMPEROR v. TULA.

APPELLATE CIVIL.

1907 *May* 14.

Before Sir George Knox, Kt., Acting Chief Justice, and Mr Justice Richards.

MOHSAN SHAH AND OTHERS (PLAINTIFFS) *v.* MAHBUB ILAHI AND OTHERS (RESPONDENTS) *

Act No. XIX of 1873 *(N.-W. P. Land Revenue Act), sections* 194*(g) and* 203 *—Act (Local) No. III of* 1899 *(Court of Wards Act), sections* 9, 35 *and* 47*—Power of Court of Wards to sell property under its superintendence*

The estate of a Muhammadan lady, named Hawa Begam, was at her own request taken under the superintendence of the Court of Wards under section 194, clause *(g)*, of Act No. XIX of 1873. This was in 1896. In 1902 the Court of Wards sold a portion of Hawa Begam's property, as was alleged, without her consent. *Held* on suit by persons claiming title through Hawa Begam to recover the property so sold, that the Court of Wards was under the circumstances entitled to sell, even without the owner's consent, and that its discretion could not be questioned in any Civil Court.

Semble that if the property had been placed under the superintendence of the Court of Wards, under section 9 of Local Act No. III of 1899, and if the sale had been made without the consent of the proprietor otherwise than on the ground set out in the concluding paragraph of section 35, the sale would have been a bad sale and the Civil Court could have entertained a suit to question the power of the Court of Wards to sell.

In 1896, under the provisions of the North-Western Provinces Land Revenue Act, section 194*(g)*, the Court of Wards, at the instance of the proprietor, assumed the superintendence of the property of one Musammat Hawa Begam. In 1902, after the coming into force of the local Court of Wards Act, 1899, the Court of Wards sold a portion of Hawa Begam's property. After Hawa Begam's death, certain persons claiming to be her heirs sued to recover from the purchase the property so sold upon the ground that the sale was without Hawa Begam's consent and *ultra vires* of the Court of Wards. The Court of first instance (Subordinate Judge of Meerut) dismissed the suit, and this decree was on appeal confirmed by the Additional District Judge. The plaintiffs thereupon appealed to the High Court.

* Second Appeal No. 1109 of 1906, from a decree of Munshi Muhammad Ahmad Ali Khan, Additional District Judge, Meerut, dated the 22nd of August 1906, confirming a decree of Mr. H. David, Subordinate Judge of Meerut, dated the 11th of December 1905.

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MOHSAN SHAH v. MANSUR ILAHI.

The Hon'ble Pandit *Madan Mohan Malaviya* and Dr. *Satish Chandra Banerji* for the appellant.

Mr. *Abdul Majid*, for the respondents.

KNOX, ACTING C. J., and RICHARDS, J.—The property in dispute in this appeal was the property of one Musammat Hawa Begam, deceased. In the year 1896, according to the plaint, Musammat Hawa Begam asked that her property might be placed under the superintendence of the Court of Wards. This prayer of hers was granted, and the property was taken charge of by the Court of Wards. We must, however, point out that the Court of Wards assumed the superintendence of this property under clause *(g)* of section 194 of Act No. XIX of 1873 and not under section 9 of the Local Act No. III of 1899. At the time when the Court of Wards took over the superintendence of this property, the Court had full power, under section 203 of Act No. XIX of 1873, to mortgage or sell the whole or any part of such property. The sale complained of was made in 1902, and section 35 of Act No. III of 1899 applies to that sale. This section gives the Court of Wards full power to mortgage or sell the whole or any part of the property under its superintendence, subject to one limitation, *viz.* where property has been placed under its superintendence under section 9 of the Local Act, such property cannot be sold without the consent of the proprietor. We need not consider the rest of the second paragraph of section 35. This property was not placed under the superintendence of the Court of Wards under section 9 of the Court of Wards Act, which had not then found its place in the statute book. Accordingly the Court had full power to make the sale in question. It is then urged that a question may arise as to whether the discretion given to the Court of Wards has been properly exercised and whether the sale was for the benefit of the ward or of the property. Section 47 of the Local Act provides that the exercise of any discretion conferred by the Court of Wards Act on the Court of Wards shall not be questioned by any Court. It is clear, therefore, that the question of discretion raised in this second appeal cannot be entertained in the Civil Court. We, therefore, arrive at the same conclusion as the Court below, but upon different grounds. If the property had been placed under the superintendence of the

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Court of Wards under section 9 of the Local Act, and if the sale had been made without the consent of the proprietor otherwise than on the ground set out in the concluding paragraph of section 35, the sale would have been a bad sale and the Civil Court could have entertained a suit to question the power of the Court of Wards to sell. The learned vakil for the appellant has contended very earnestly and said all that could be said on behalf of his clients, but the fact that the estate was taken under the superintendence of the Court of Wards under the provisions of Act No. XIX of 1873 renders his position untenable. The appeal is dismissed with costs.

Appeal dismissed.

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May 14.

Before Mr Justice Aikman.

RAM SUKH (PLAINTIFF) *v* RAM SAHAI (DEFENDANT) *

Civil Procedure Code, section 316—*Execution of decree—Sale in execution—Decree reversed before confirmation of sale.*

Held that the title of an auction purchaser at a sale held in execution of a decree does not become absolute if the decree under which the sale took place is reversed at any time before a certificate of sale is granted to the purchaser

IN execution of a decree against one Ram Sukh a house belonging to the judgment-debtor was sold by auction and purchased by one Ram Sahai. Before, however, the sale was confirmed, the decree was set aside in appeal. Thereafter Ram Sukh applied to the Court to be allowed to withdraw the purchase money deposited in Court; but the auction purchaser objected to this, and the parties were referred to a Civil Court. Ram Sukh then filed the present suit in which he asked in the alternative either to be given the price deposited in Court or to be restored to possession of the house. The Court of first instance (Munsif of Sambhal) gave the plaintiff a decree for the money. The defendant appealed, and the lower appellate Court (officiating Subordinate Judge of Moradabad) reversed the decree of the Munsif and directed the house to be restored to the plaintiff. The plaintiff appealed to the High Court.

* Second Appeal No 1270 of 1905, from a decree of Pandit Mohan Lal, Officiating Subordinate Judge, Moradabad, dated the 6th of September 1905, reversing a decree of Babu Sheodarshan Dayal, Munsif of Sambhal, dated the 5th of April 1905

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RAM SUKH v. RAM SAHAI.

Munshi *Gobind Prasad*, for the appellant.

Pandit *M. L. Sandal*, for the respondent.

AIKMAN, J.—One Chunni Lal had a simple money decree against the appellant Ram Sukh. In execution of that decree a house belonging to the appellant Ram Sukh was sold, and was purchased by the respondent Ram Sahai, who paid the money into Court. Section 316 of the Code of Civil Procedure provides that the title to the property sold, in a case like this, shall vest in the purchaser from the date of the certificate which is granted to the purchaser under that section, and it contains this important proviso, namely, "that the decree under which the sale took place was still subsisting at that time." I infer from this proviso that even though a sale has become absolute on being confirmed under section 314, the Court may hold its hand and refuse to grant a certificate if before the certificate is granted the decree under which the property was sold is no longer subsisting. In the present case the decree under which the property was sold was reversed on the 19th of March 1904. That was before the sale was confirmed. It appears that no certificate has yet been issued to the auction purchaser, Ram Sahai, and consequently the title to the property sold has not yet vested in him. It also appears that when the decree against him was set aside Ram Sukh applied to be allowed to take out the price of the property, which had been deposited in Court. The purchaser objected to this and said that he should take back the property. The parties were referred to the Civil Court. Thereupon the plaintiff brought the suit out of which this appeal arises, in which he asked that he should be declared entitled to receive from the Court the sale price deposited in Court, or in the alternative that he might be put in possession of the house. The respondent, Ram Sahai, had no objection to the grant of the latter relief, but he objected to the money being taken out of Court. The Court of first instance decreed the first relief asked for by the plaintiff. On appeal the learned Officiating Subordinate Judge, for the reasons set forth in his judgment, held that under the circumstances no title to the house had passed to the purchaser, and that the plaintiff was entitled to get back the house and not the purchase money. The plaintiff comes here in second appeal. In my opinion the view taken by

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RAM SUKH v. RAM SAHA.

the Court below is right. It is quite true that a *bond fide* purchaser, who is not himself the decree-holder, does not lose his title to the property by the subsequent reversal of the decree in execution of which he bought. But in the present case the language of section 316 of the Code of Civil Procedure shows that no title had passed to the purchaser. This being so, the decree of the Court below was, in my opinion, the right decree to pass. I therefore dismiss this appeal with costs.

Appeal dismissed.

1907
May 27.

Before Mr. Justice Aikman and Mr Justice Griffi .

THAMMAN PANDE (DEFENDANT) v. THE MAHARAJA OF VIZIANAGRAM (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, Article* 144—*Limitation—Adverse possession—Lease—Possession derived from a lessee not necessarily adverse as against the lessor.*

Held that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. The principle of *Muhammad Husain* v *Mul Chand* (1) and *Sharat Sundari Dabia* v *Bhobo Pershad Khan Chowdhuri* (2), *Womesh Chunder Goopto* v. *Raj Narain Roy* (3), *Krishna Gobind Dhur* v. *Hari Churn Dhur* (4), *Shee Sohye Roy* v. *Luchmeshur Singh* (5) and *Gunga Kumar Mitter* v. *Asutosh Gossami* (6) followed *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (7) referred to *Lekhraj Roy* v *The Court of Wards on behalf of the Rajah of Durbhangah* (8), *Brindabun Chunder Sircar Chowdhry* v *Bhoopal Chunder Biswas* (9), *Prosunnomoyi Dasi* v. *Kali Das Roy* (10) and *Gobinda Nath Shaha Chowdhry* v. *Surja Kantha Lahiri* (11), not followed

THE facts of this case are as follows:—

The plaintiff leased the village of Saheli to one Girish Chandra from 1297 to 1309 Fasli. During the continuance of the lease the defendant in some manner got possession of 8 plots of land in the village, from which, some two years before the expiry of the lease, the plaintiff brought the present suit to eject him. The

* Second Appeal No 758 of 1905, from a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Jaunpur, dated the 9th of May 1905, modifying a decree of Maulvi Shams-ud-din Khan, Munsif of Jaunpur, dated the 3rd of October 1904.

(1) (1904) I. L. R., 27 All., 395
(2) (1886) I. L. R., 13 Calc., 101.
(3) (1868) 10 W. R., 15
(4) (1882) I. L. R., 9 Calc., 367.
(5) (1884) I. L. R., 10 Calc., 577.
(6) (1896) I. L. R., 23 Calc., 863.
(7) (1878) I. L. R., 4 Calc., 327.
(8) (1870) 14 W. R., 395
(9) (1872) 17 W. R., 377.
(10) (1881) 9 C. L. R., 347.
(11) (1899) I. L. R., 26 Calc., 460.

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defendant pleaded that he had purchased the plots in suit on the 21st of September 1897 from one Piaj Umar, whom he alleged to be to the owner thereof. He further contended that, if his vendor was not the true owner, he had acquired a title by adverse possession. The Court of first instance (Munsif of Jaunpur) gave the plaintiff a decree for possession of six out of the eight plots claimed, but dismissed it as to the remaining two plots. The Court found that the defendant had established a claim to two of the plots by adverse possession of himself and his vendor. On appeal by the plaintiff the lower appellate Court (Subordinate Judge of Jaunpur) held that possession during the term of the lease was not adverse to the owner, and accordingly decreed the plaintiff's claim in full. Both Courts found that the plaintiff's vendor was not the owner of the land. The defendant appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondent.

AIKMAN and GRIFFIN, JJ.—This appeal arises out of a suit brought by the plaintiff, who is respondent here, for possession of 8 plots of land, situated in the village of Saheli, which admittedly belongs to the plaintiff. This village was given in lease by the plaintiff to one Girish Chandra. The period of the lease was from 1297 to 1309 Fasli. The present suit was brought within two years of the expiry of the lease to eject the defendant, Thamman Pande, who is appellant here, from 8 plots of land situated in the village. The defendant's case was that he had purchased the plots on the 21st of September 1897 from one Piaj Umar, whom he alleged to be the owner of the plots. The defendant further contended that, if his vendor was not the true owner, a title by adverse possession had been acquired. The Munsif dismissed the suit as to two of the plots and passed a decree in favour of the plaintiff for ejectment of the defendant from the remaining six plots. The defendant appealed and the plaintiff filed an objection under section 561 of the Code of Civil Procedure. The learned Subordinate Judge dismissed the defendant's appeal, allowed the plaintiff's objection and decreed his claim in full. The Courts below found that the plaintiff's vendor was not the

owner of the land. But the Court of first instance held that the defendant had established a claim to two of the plots by adverse possession of himself and his vendor. The learned Subordinate Judge, following a ruling of the Calcutta High Court—*Sharat Sundar Dabia* v. *Bhobo Pershad Khan Chowdhurr* (1), held that possession during the term of the lease was not adverse to the zamindar. If that view is correct this appeal must fail. For the appellant reliance is placed on certain other rulings of the Calcutta High Court, namely, *Lekhraj Roy* v. *The Court of Wards on behalf of the Rajah of Durbhangah* (2), *Brindabun Chunder Sircar Chowdhry* v. *Bhoopal Chunder Biswas* (3), *Prosunnomoyi Dasi* v. *Kali Das Roy* (4) and *Gobinda Nath Shaha Chowdhry* v. *Surja Kantha Lahiri* (5). No doubt these rulings support the view contended for by the appellant's learned vakil, but on this question there is a great conflict of authority in the Calcutta High Court. On the other side may be cited in addition to the case relied on by the lower appellate Court the following rulings:—*Womesh Chunder Goopto* v. *Raj Narain Roy* (6), *Krishna Govind Dhur* v. *Hari Churn Dhur* (7), *Sheo Sohye Roy* v. *Luckmeshur Singh* (8) and *Gunga Kumar Mitter* v. *Asutosh Gossami* (9). Attention may also be called to what was said by Mr. Justice Markby in the case of *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (10). At page 329 of the judgment that learned Judge said:—"By adverse possession I understand to be meant possession by a person holding the land on his own behalf of some person other than the true owner, the true owner having a right to immediate possession." It has been held by this Court—see the case *Muhammad Husain* v. *Mul Chand* (11)—that possession during the period of a usufructuary mortgage is not adverse to the true owner. We consider the same principle applies to possession during the term of a lease, when all that the owner is entitled to is the yearly payment of the consideration reserved by the lease. It would be unjust to hold that a lessor, who was regularly in receipt of the rent reserved by the lease

(1) (1886) I. L. R., 13 Calc., 101.
(2) (1870) 14 W. R., 395.
(3) (1872) 17 W. R., 377
(4) (1881) 9 C. L. R., 347
(5) (1899) I. L. R., 26 Calc., 460.
(6) (1868) 10 W. R., 15.
(7) (1882) I. L. R., 9 Calc., 367.
(8) (1884) I. L. R., 10 Calc., 577.
(9) (1896) I. L. R., 23 Calc., 863.
(10) (1878) I. L. R., 4 Calc., 327.
(11) (1904) I. L. R., 27 All., 395.

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for a long term of years, and who therefore had nothing to put him on inquiry, might find at the expiration of the term of his lease that a considerable portion, it may be, of his property had passed out of his hands by a trespasser taking possession of it without his knowledge. We are quite unable to appreciate the reasoning of the learned Judges who decided the latest case in the Calcutta High Court, namely, *Gobinda Nath Shaha* v. *Surja Kantha* (1). We are of opinion that the decision of the Court below was right and we dismiss this appeal with costs.

Appeal dismissed.

1907
May 28.

Before Mr. Justice Banerji.

GHASITI BIBI AND OTHERS (JUDGMENT-DEBTORS) *v.* ABDUL SAMAD (DECREE-HOLDER) AND LIAQAT HUSAIN (AUCTION-PURCHASER) *

Civil Procedure Code, sections 103, 310 *and* 588 (8)—*Appeal—Order refusing to restore an application under section* 310 *which had been dismissed for default of appearance.*

Held that no appeal lies from an order refusing to restore to the file of pending applications an application under section 310 of the Code of Civil Procedure which has been dismissed for default of appearance. The principle applied in *Jung Bahadur* v *Mahadeo Prosad* (2), *Ningappa* v. *Gangawa* (3) and *Raja* v. *Strinivasa* (4), followed.

THE facts of this case are as follows :—

There was a decree against Musammat Ghasiti Bibi and others, in execution of which the property of the judgment-debtors was sold by auction on the 21st of July 1906 and was purchased by one Liaqat Husain. An application under section 310 of the Code of Civil Procedure was presented by one Kallu, who described himself as the agent of two of the judgment-debtors, praying to have the sale set aside. The auction-purchaser resisted this application, and the 15th of September 1906 was fixed for hearing. On that date the applicant did not appear, and consequently the application was rejected for default of appearance. On the 20th of September 1906 Ghasiti Bibi made an application to the Court asking for the restoration of the case. This application purported to have been made under section 103 of the Code of

* First Appeal No. 348 of 1906, from a decree of Babu Prag Das, Subordinate Judge of Allahabad, dated the 26th of November 1906.

(1) (1899) I. L. R., 26 Calc., 460.
(2) (1903) I. L. R., 31 Calc., 207.
(3) (1885) I. L. R., 10 Bom., 438.
(4) (1888) I. L. R., 11 Mad., 319.

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Civil Procedure. On the 26th of November it was rejected, and from this order the judgment-debtors appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants.

Mr. *Karamat Husain*, for the respondents.

BANERJI, J.—A preliminary objection has been raised by the learned counsel for the respondents to the effect that no appeal lies in this case. For the purpose of determining this objection it is necessary to state the circumstances under which the appeal was filed. There was a decree against Musammat Ghasiti Bibi and others, in execution of which the property of the judgment-debtors was sold by auction on the 21st of July 1906 and was purchased by the respondent Liaqat Husain. An application under section 310 of the Code of Civil Procedure was presented by one Kallu, who described himself as the agent of two of the judgment-debtors, praying to have the sale set aside. The auction-purchaser resisted this application, and the 15th of September 1906 was fixed for hearing. On that date the applicant did not appear, and consequently the application was rejected for default of appearance. On the 20th of September 1906 Ghasiti Bibi made an application to the Court asking for the restoration of the case. This application purported to have been made under section 103 of the Code of Civil Procedure. On the 26th of November it was rejected, and from this order the present appeal has been preferred. It is contended that no appeal lies from an order dismissing an application under section 103 unless the order is one by which an application to set aside the dismissal of a suit has been rejected and the order in this case is not an order of that description. The objection seems to me to be well founded. It is not denied that unless the law gives a right of appeal against any particular order, no appeal lies against such order. The only case in which an appeal is allowed against an order passed under section 103 is that mentioned in clause (8), section 588 of the Code of Civil Procedure. Under that clause an appeal lies from orders rejecting applications under section 103 for an order to set aside the dismissal of a suit. It is true that under the explanation to section 647 of the Code and under the rulings of their Lordships of the Privy Council, proceedings in execution are proceedings in the suit. But it is not

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every order in a suit or execution proceeding dismissing an application under section 103 which is open to appeal under section 588. The only order under section 103 from which an appeal is allowed by section 588 is, as said above, an order rejecting an application to set aside the dismissal of a suit. The order complained of in this case is not an order rejecting an application to have the dismissal of a suit set aside. No appeal therefore lies from that order. In the case of an application under section 311 of the Code of Civil Procedure dismissed for default of appearance and sought to be restored by an application under section 103 it was held by the Calcutta High Court in *Jung Bahadur* v. *Mahadeo Prosad* (1), following *Ningappa* v. *Gangawa* (2) and *Raja* v. *Srinivasa* (3), that no appeal lies. The principle laid down in these cases applies equally to the present case, and I must hold that no appeal lies. I accordingly allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1907
May 29.

Before Mr Justice Dillon.

EMPEROR *v.* BUDH LAL.*

Act No. XLV of 1860 *(Indian Penal Code), section* 411—*Possession of stolen property—Joint Hindu family—Liability of head of the family, or managing member.*

Stolen property consisting of a considerable quantity of cloth weighing about five maunds were discovered on search by the police in a locked room in a house belonging to and inhabited by a joint Hindu family composed of a father, son and grandson. The son was found to be the managing member of the family, and the key of the room in which the stolen property was found was produced by him. The circumstances were such that it was very improbable that the cloth could possibly have been placed where it was found without the connivance of some or all of the members of the family. *Held* that under the above circumstances the conviction of the managing member of the family under section 411 of the Indian Penal Code was a proper conviction. *Queen-Empress* v. *Sangam Lal* (4) referred to.

THE facts of this case are as follows:—

Three bales of cotton cloth had been consigned by a firm in Cawnpore to a shopkeeper at Jalaun, of which only two arrived

* Criminal Revision No. 215 of 1907.

(1) (1903) I. L. R., 31 Calc., 207.
(2) (1885) I. L. R., 10 Bom., 438.
(3) (1888) I. L. R., 11 Mad., 319.
(4) (1893) I. L. R., 15 All., 129.

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at their destination. It was alleged by the prosecution that the missing bale was stolen while in transit from Orai to Jalaun on some date between the 14th and 29th December 1906. Acting upon information received a Police Sub-Inspector made a search in the house at Jalaun occupied by one Budh Lal, his father and his son. While proceeding with the search the Sub-Inspector asked to be allowed to go into a room, which was locked, and which had not been entered. He was informed that that room contained only some wood, grain and other property of an ordinary nature. Thereupon the Sub-Inspector demanded the key, and was told that it could not be found. Upon the Sub-Inspector's saying that he would have to break open the door with the assistance of a blacksmith, the key was brought by Budh Lal. When the door was opened the greater part of the contents of the missing bale, namely, some 97 pieces of cloth, about Rs. 285 in value, were found. Budh Lal, his father and his son were put upon their trial before a Deputy Magistrate of Jalaun with the result that only Budh Lal was convicted. He was sentenced to 18 months' rigorous imprisonment and a fine of Rs. 500. Budh Lal appealed to the Sessions Judge of Jhansi, by whom his appeal was dismissed. He thereupon applied in revision to the High Court.

Mr. *C. Ross Alston*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

DILLON, J.—This is an application for revision of an order of a Deputy Magistrate of Jalaun convicting the petitioner, one Budh Lal, under section 411 of the Indian Penal Code and sentencing him to 18 months' rigorous imprisonment and a fine of Rs. 500. The facts out of which this conviction has arisen are briefly these:—Three bales of cotton cloth had been consigned by a firm in Cawnpore to a shopkeeper at Jalaun, of which only two arrived at their destination. Goods consigned to Jalaun are conveyed on bullock carts starting from the railway station at Orai, and the case for the prosecution is that the missing bale was stolen while in transit from Orai to Jalaun on some date between the 14th and 29th December last. Acting upon information received the Police Sub-Inspector made a search in the house at

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Jalaun occupied by the petitioner, his father and his son. While proceeding with the search the Sub-Inspector asked to be allowed to go into a room, which was locked, and which had not been entered. He was informed that that room contained only some wood and grain, etc. Thereupon the Sub-Inspector demanded the key, and was told that it could not be found. Upon the Sub-Inspector's saying that he would have to break open the door with the assistance of a blacksmith, the key was brought by Budh Lal, petitioner. When the door was opened the greater part of the contents of the missing bale, namely, some 97 pieces of cloth, about Rs. 285 in value, were found. Budh Lal and his father and his son were put upon their trial before the Magistrate, with the result that only Budh Lal was convicted. The only defence put forward in the Court below was that the goods had been placed where they were found in order to get the accused into trouble; but this defence is negatived by the fact that the room in which the property was discovered was built of masonry and was locked and intact. The only argument which has been addressed to me in revision is that the mere fact that the petitioner was the managing member of the family ought not to have led the Courts below to the conclusion at which they have arrived. I should have been quite prepared to accept this contention if that were the only ground upon which this conviction was based. But the other facts of the case, namely, the size of the missing bale, its weight, 5 maunds, the fact that it could not have been got into the house surreptitiously, that the room in which it was found was locked, and that the key was produced by the petitioner, were also taken into consideration, and it is upon them, as well as on the fact that the petitioner is the managing member of the family that the conviction is based. The question whether a person accused of an offence under section 411 of the Indian Penal Code had guilty knowledge is a question of fact, and in this case it has been held to be proved that the petitioner, Budh Lal, had such knowledge. The finding by the Magistrate on this point is clear and unmistakeable. That of the lower appellate Court, though not quite so clear, is, as I understand it, to the same effect. I may say that had I been trying this case as an appeal I should have arrived at the same conclusion

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Knowledge of the presence in the house of the stolen property having been established against Budh Lal, he must, as the house-master, be presumed to have been in possession of it. *Queen-Empress* v. *Sangam Lal* (1) is an authority for this proposition.

The learned counsel for the petitioner has addressed me on the question of sentence. This is no doubt a very serious offence, and it is aggravated by the fact that Budh Lal is in affluent circumstances, and apparently doing a good business, but I take into consideration the fact that a sentence of imprisonment will mean a great deal more to a man in his position than to the ordinary criminal. Under the circumstances I think a sentence of one year would meet the ends of justice. I accordingly alter the sentence from one of 18 months to one of one year's rigorous imprisonment. The conviction stands. Subject to this modification the appeal is dismissed.

APPELLATE CIVIL.

1907
May 30.

Before Mr Justice Griffin.

BIHARI AND ANOTHER (PLAINTIFFS) *v* SHEOBALAK (DEFENDANT).*

Act (Local) No. II of 1901 *(Agra Tenancy Act) section* 199—*Suit for ejectment in Revenue Court—Omission on part of defendant to plead title in himself*—Res judicata.

In a suit for ejectment under Act No. II of 1901 the defendants did not plead their own title to the plot in suit, and in fact did not oppose the suit for ejectment. *Held* that a subsequent suit brought in a Civil Court by the then defendants for proprietary possession of the same plot was barred by the principle of *res judicata*. *Ram Kishore* v. *Raja Ram* (2), *Ashraf-un-nissa* v. *Ali Ahmad* (3) and *Inayat Ali Khan* v. *Murad Ali Khan* (4) distinguished. *Salig Dube* v. *Deoki Dube* (5) and *Ram Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur* (6) referred to. *Gokul Mandar* v. *Padmanund Singh* (7) discussed.

THIS was a suit for proprietary possession of a plot of land.

The plaintiffs alleged that they and the defendant were members of one family; that on a partition the plot in question had

* Second Appeal No. 369 of 1906, from a decree of Babu Bepin Behari Mukerji, Judge of the Court of Small Causes, Cawnpore, with powers of the Subordinate Judge, dated the 12th of February 1906, reversing a decree of Babu Birj Behari Lal, Munsif of Akbarpur, dated the 12th of June 1905.

(1) (1893) I. L. R., 15 All., 129, at p. 131.
(2) Weekly Notes, 1904, p. 109.
(3) Weekly Notes, 1904, p. 141.
(4) (1905) I. L. R., 27 All., 569.
(5) Weekly Notes, 1907, p. 1.
(6) (1907) I. L. R., 29 All., 160.
(7) (1902) I. L. R., 29 Calc., 707.

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been assigned to the plaintiffs' share, and that in July 1904 they had applied for mutation of names in respect of this plot, but their application had been rejected. The defendant pleaded his own title, and also that the suit was not maintainable in view of the fact that on the 4th of November 1904 he had obtained a decree from a Revenue Court for ejectment of the plaintiffs as his tenants of the plot in suit. The Court of first instance (Munsif of Akbarpur) decreed the claim. On appeal the lower appellate Court (Small Cause Court Judge of Cawnpore, with powers of a Subordinate Judge) reversed the decree of the Munsif and dismissed the suit. That Court found that in the ejectment suit the present plaintiffs (then defendants) did not plead their own title to the plot in suit, and in fact did not defend the suit at all, and held that by reason of this omission the plaintiff were precluded from maintaining the present suit. The plaintiffs appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Munshi *Gobind Prasad*, for the respondent.

GRIFFIN, J.—The plaintiffs sued for proprietary possession of plot No. 916 on the allegation that they and defendant were members of one family; that on a partition the plot in suit was assigned to the plaintiffs' share; that in July 1904 they applied for mutation of names in respect of this plot, but their application was rejected. The defendant pleaded his own title and also that the present suit was not maintainable, in view of the fact that on the 4th of November 1904 he had obtained a decree from a Revenue Court for the ejectment of the plaintiffs as his tenants of the plot in suit. It is found by the lower Court that in the ejectment suit the defendants did not plead their own title to the plot in suit, and in fact they did not oppose the suit for ejectment. The learned Subordinate Judge has held that as the plaintiffs omitted to set up their title in a former suit, they are now precluded from maintaining the suit. In second appeal it is strenuously contended on behalf of the plaintiffs appellants that the provisions of section 13 of the Code of Civil Procedure are not applicable to the present case, inasmuch as the Revenue Court which decided the ejectment suit had not jurisdiction to try the present suit for title, and it is pointed out that in the ejectment suit no question of title was raised, and it is urged that the provisions of

section 199 of the Tenancy Act do not apply. I have been referred to the following rulings :—*Rani Kishori* v. *Raja Ram* (1) and *Ashraf-un-nissa* v. *Ali Ahmad* (2). These rulings were passed upon cases under Act XII of 1881. A comparison of section 199 of the Tenancy Act with section 208(*a*) of Act XII of 1881 shows that there has been an important alteration in the law, inasmuch as under the Tenancy Act a Revenue Court is empowered to determine a question of title in cases where the defendant pleads he is not a tenant. In view of this change in the law, I cannot regard the rulings just quoted as entirely applicable to the present state of things. Similarly in *Inayat Ali Khan* v. *Murad Ali Khan* (3) the decision which it was said operated as *res judicata* had been also passed under the former Act No. XII of 1881. In *Sahig Dubé* v. *Deoki Dube* (4) which was under the present Tenancy Act of 1901, the defendants pleaded that they were not tenants, but had proprietary rights in the land. The Revenue Court under the provisions of section 199 of the Act determined the issues thus raised itself, and decided as to one of the defendants, that he was a tenant of the plaintiffs; and this decision became final. It was held that the decision of the Revenue Court was a bar to the institution by this defendant of a suit in a Civil Court claiming to recover possession of the same land as proprietor. The principle of this decision was followed in another case decided by the same Bench of this Court, namely, *Beni Pande* v. *Raja Kausal Kishore Prasad Mal Bahadur* (5). The present case is distinguishable from these latter reported cases, inasmuch as the then defendants omitted to raise any plea in the Revenue Court that they were owners, not the tenants, of the plot in suit. The question for decision therefore is, have they by their omission to plead their proprietary title in the suit for ejectment precluded themselves from suing in the Civil Court to establish their proprietary title? For the appellants it is contended on the authority of the Privy Council ruling in *Gokul Mandar* v. *Pudmanund Singh* (6) that the provisions of section 13 of the Code of Civil Procedure must be strictly construed. The passage in their Lordships' judgment to

(1) Weekly Notes, 1904, p. 109.
(2) Weekly Notes, 1904, p. 141.
(3) (1905) I. L. R., 27 All., 562.
(4) Weekly Notes, 1907, p. 1.
(5) (1907) I. L. R., 29 All., 16.
(6) (1902) I. L. R., 29 Calc., 707.

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which I have been particularly referred occurs at page 715. I need only observe that the remarks of their Lordships were *obiter*. I am unable to infer from these observations that their Lordships, if dealing with a case under the Tenancy Act, would hold that the decision of a Revenue Court under section 199 of the Tenancy Act could not operate as *res judicata*. The claim which the plaintiffs now make, that they are owners of the plot in suit, is clearly a plea which might and ought to have been raised by them in their defence to the ejectment suit. If they had raised that plea, the Revenue Court might under the provisions of section 199 of the Tenancy Act, have determined the question itself or required the defendant to institute a suit for determination of the question of title. In my opinion the learned Subordinate Judge was right in holding that the present suit was not maintainable. I dismiss this appeal with costs.

Appeal dismissed.

1907

June 4.

Before Mr. Justice Banerji and Mr. Justice Aikman.

NATHI MAL AND ANOTHER (PLAINTIFFS) *v.* TEJ SINGH AND OTHERS (DEFENDANTS).*

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), sections* 110, 111 *and* 233*(h)—Partition—Objections not raised before Revenue Court—Suit in Civil Court for declaration of title—Jurisdiction.*

On the 12th of March 1904 defendants applied to the Revenue Court for partition of their share in two mahals. Proclamation was issued on that application calling upon the opposite party to appear on the 18th of April 1904 and state their objections, if any, to the partition. The opposite party did not appear in the Revenue Court, but on the 20th of April 1904 instituted a suit in a Civil Court against the applicants for partition asking for a declaration of their exclusive possession over part of the property, the subject matter of the defendants' application for partition in the Revenue Court. *Held* that the plaintiffs' suit was not maintainable. *Muhammad Sadiq* v. *Laute Ram* (1) and *Khasay* v. *Jugia* (2) referred to.

THE facts of this case are as follows :—

In the village of Khera Buzurg there were two mahals, one known as mahal Naubat Singh and the other as mahal Ganga Bakhsh. In the record of rights of both the mahals the plaintiffs were recorded as owing 5 biswas in each mahal, the other 5 biswas

*First Appeal No. 265 of 1904, from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 29th of June 1904.

(1) (1901) I. L. R., 23 All., 291. (2) (1906) I. L. R., 28 All., 432.

being recorded in the names of the defendants. On the 6th of February 1904 the defendants applied to the Revenue Court for partition of their share in the two mahals. On the 12th of March 1904 a proclamation was issued, as required by section 110 of Act No. III of 1901 calling upon the recorded co-sharers to appear on the 18th of April 1904 and state their objections, if any, to the partition. The plaintiffs did not appear in the Revenue Court in answer to this proclamation, but on the 20th of April 1904 instituted the present suit in a Civil Court, suppressing the fact that partition proceedings were pending in the Revenue Court. In this suit the plaintiffs alleged that under a partition which took place before the Mutiny their predecessors in title become owners of the whole of mahal Naubat Singh, although they were recorded as owning only a half; that they were in exclusive possession of the whole mahal, and that the defendants had not interest therein. They asked for a declaration that they were the absolute owners of mahal Naubat Singh and added an alternative prayer for possession. The Court of first instance (Subordinate Judge of Aligarh) dismissed the plaintiffs' suit on the merits. The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondents.

BANERJI and AIKMAN, JJ.—The main question which arises in this appeal is whether the suit brought by the plaintiffs appellants is maintainable having regard to the provisions of section 233, clause *(k)*, of the Land Revenue Act No. III of 1901. The facts are as follows:—In the village of Khera Buzurg there were two mahals, one known as mahal Naubat Singh and the other as mahal Ganga Bakhsh. In the record of rights of both the mahals the names of the plaintiffs appear as owning 5 biswas in each mahal, the other 5 biswas being entered in the names of the defendants. The plaintiffs alleged that under a partition which took place before the Mutiny their predecessors in title became owners of the whole of the mahal Naubat Singh, although they are recorded as owning only a half; that they have been in exclusive possession of the mahal, and that the defendants have no interest

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in it. They brought the present suit on the 20th of April 1904 for a declaration that they are the absolute owners of mahal Naubat Singh. They also prayed in the alternative for possession. It appears that on the 6th of February 1904 the defendants applied to the Revenue Court for partition of their share in the two mahals. On the 12th of March 1904 a proclamation was issued as required by section 110 of Act No. III of 1901 calling upon the recorded co-sharers to appear on the 18th of April 1904 and state their objections, if any, to the partition. The plaintiffs did not choose to appear before the Revenue Court to prefer objections, but on the 20th April 1904 instituted the present suit. We may note that in their plaint they suppressed all mention of the fact that an application for partition was pending in the Revenue Court. The partition, we may mention, has been carried out by the revenue authorities, and was confirmed on the 29th of September 1906. Under these circumstances the first question we have to decide is whether the suit is maintainable in the Civil Court. In the Full Bench case of *Muhammad Sadiq* v. *Lauto Ram* (1) it was held unanimously that if a party to a partition conducted by the revenue authorities desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in the Land Revenue Act. The suit in that case had been instituted after the completion of the partition, and it was held that the suit was not maintainable. Two of the Judges left it an open question whether had the suit been instituted before the completion of the partition proceedings it would have been maintainable. We have therefore to decide the question which it was not necessary to decide in that case and was left undecided. In our judgment, having regard to the provisions of the Land Revenue Act, a party who might have raised a question of title in partition proceedings and had an opportunity of doing so, but omitted to do so in the Revenue Court is not entitled to bring a suit in the Civil Court to have that question determined. The law has by section 111, sub-section (1), conferred on the Revenue Court the power to determine whether it shall try the question of title itself or require any party to the case to institute a suit in a Civil Court for determination

(1) (1901) I. L. R., 23 All., 291.

of such question. This power can only be exercised by the revenue authorities, and it is not competent to a party to partition proceedings himself to make an election as to the Court which should try the question of title raised. In our opinion the Legislature clearly contemplated that before the arduous and often protracted work of partition has begun all questions of title should have been determined. If we were to hold that the present suit is maintainable it would be open to a party to wait till the work of partition was on the point of completion, and then by a suit in a Civil Court to undo what might be the work of years done by the revenue authorities. In *Khasay* v. *Jugla* (1) it was held that the prohibition contained in section 233, clause *(k)* of Act No. III of 1901, applies to suits with respect to partition in which the plaintiff has had an opportunity of having his objections considered under section 111 and has not availed himself of it The learned Judges go on to say:—"Where a party has had the opportunity of representing his case in the Revenue Court and has not availed himself of it, we should have no hesitation in holding that the jurisdiction of a Civil Court is barred by section 233." This remark, which in that case was *obiter*, was adhered to by the same Bench in the unreported case of *Lala Makhan Lal* v. *Musammat Wahidi Begam* (Second Appeal No. 512 of 1906, decided on the 3rd of January 1907). The learned Judges held that as the plaintiff had an opportunity of representing his objections in the Revenue Court and did not avail himself of it within the time allowed by law, the jurisdiction of the Civil Court was barred. The result is that in our judgment this suit was not maintainable and this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

(1) (1906) I. L. R., 28 All., 432.

1907
June 6

Before Mr. Justice Banerji and Mr. Justice Aikman.

NIADAR MAL (DEFENDANT) v. RAUNAK HUSAIN (PLAINTIFF).*

Suit to set aside a decree on the ground of fraud—Sole question raised in the suit already decided in proceedings under section 108 of the Code of Civil Procedure—Res judicata.

In a suit to set aside a decree as having been obtained against the plaintiff by fraud substantially the only ground relied upon was that the suit had been improperly instituted against the plaintiff as of full age when in fact he was a minor. This had been decided against the plaintiff in earlier proceedings between the parties under section 108 of the Code of Civil Procedure. *Held* that the suit was not maintainable. *Puran Chand* v. *Shandat Ras* (1) followed. *Khagendra Nath Mahata* v. *Pran Nath Roy* (2) distinguished.

THE facts of this case are as follows:—

One Abbas Ali and his cousin Ahmad Husain owned certain property. On the 9th of July 1881 both of them executed a mortgage in favour of Jitta Mal in respect of a 4 biswa share in the village of Sadaruddinnagar, each hypothecating his 2 biswa share. On the 23rd of February 1900 Jitta Mal obtained a decree on the strength of that mortgage against Abbas Ali and the legal representatives of Ahmad Husain, one of whom is the plaintiff Raunak Husain, who in that suit was sued as a minor. On the 2nd of August 1889 Abbas Ali alone executed a mortgage of his 2 biswa share of Sadaruddinnagar and other property in favour of Jitta Mal. The mortgage and the decree of Jitta Mal obtained upon the prior mortgage of 1881 were assigned by him to Bhaironji Lal. On the 17th of November 1898 Abbas Ali alone executed in favour of Ghasi Ram a third mortgage of his 2 biswa share in Sadaruddinnagar and some other property. On the 16th of January 1903 Ghasi Ram brought a suit on the basis of this mortgage against Abbas Ali. As Ghasi Ram claimed redemption of the prior mortgages of 1881 and 1889 he impleaded as defendants Bhaironji Lal, the assignee from Jitta Mal, as also the heirs of Ahmad Husain, among whom was the present plaintiff Raunak Husain, who was sued as of full age. He put in no appearance, and a decree was passed on the 29th of June 1903 against all the defendants providing for redemption of the prior mortgages held by Bhaironji Lal. Ghasi Ram

* First Appeal No 73 of 1905, from a decree of Pandit Giraj Kishor Datt, Subordinate Judge of Moradabad, dated the 19th of December 1904.

(1) (1906) I. L. R., 29 All., 212. (2) (1902) I. L. R., 29 Calc., 395.

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redeemed those mortgages and has assigned the decree to one Niadar Mal. The decree against Raunak Husain and some of the other defendants was *ex parte*. On behalf of Raunak Husain an application was made under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside on the allegation that he was a minor at the time of the suit. That application was dismissed by the Court of first instance after recording evidence and on the finding that Raunak Husain was of age on the date of the institution of the suit. Against this order an appeal was preferred to the learned District Judge. He found that there was "ample evidence on the record to show that he (Raunak Husain) was of age on the date of the suit, and that there was no reason for not believing the evidence." He accordingly on the 6th of July 1904 dismissed the appeal. On the 2nd August 1904. Raunak Husain instituted the present suit for a declaration that the decree in favour of Ghasi Ram of the 29th of June 1903 was obtained by means of fraud and was null and void as against him. The question at issue was really the same as that raised in the application under section 108 of the Code of Civil Procedure, namely, whether Raunak Husain had been improperly impleaded as *sui juris* in the former suit when to the knowledge of the then plaintiff he was a minor. The Court of first instance (Subordinate Judge of Moradabad) differed from the conclusions arrived at by the District Judge in the earlier litigation and made a decree setting aside in its entirety the decree of the 29th of June 1903. The defendant appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* and Maulvi *Ghulam Mujtaba*, for the respondent.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen was brought by the respondent Raunak Husain for a declaration that a decree dated 29th June 1903 was null and void. It appears that Abbas Ali and his cousin Ahmad Husain owned certain property. On the 9th of July 1881 both of them executed a mortgage in favour of Jitta Mal in respect of a 4 biswa share in the village of Sadaruddinnagar, each hypothecating his 2 biswa share. On the 23rd of February 1900 Jitta Mal obtained a decree

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on the strength of that mortgage against Abbas Ali and the legal representatives of Ahmad Husain, one of whom is the plaintiff Raunak Husain, who in that suit was sued as a minor. On the 2nd of August 1889 Abbas Ali alone executed a mortgage of his 2 biswa share of Sadaruddinnagar and other property in favour of Jitta Mal. This mortgage and the decree of Jitta Mal obtained upon the prior mortgage of 1881 were assigned by him to Bhaironji Lal. On the 17th of November 1898 Abbas Ali alone executed in favour of Ghasi Ram a third mortgage of his 2 biswa share in Sadaruddinnagar and some other property. On the 16th of January 1903 Ghasi Ram brought a suit on the basis of this mortgage against Abbas Ali. As Ghasi Ram claimed redemption of the prior mortgages of 1881 and 1889 he impleaded as defendants Bhaironji Lal, the assignee from Jitta Mal, as also the heirs of Ahmad Husain, among whom was the present plaintiff Raunak Husain, who was sued as a major. He put in no appearance, and a decree was passed on the 26th of June 1903 against all the defendants providing for redemption of the prior mortgages held by Bhaironji Lal. Ghasi Ram has redeemed those mortgages and has assigned the decree to the appellant Niadar Mal. The decree against Raunak Husain and some of the other defendants was *ex parte*. On behalf of Raunak Husain an application was made under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside on the allegation that he was a minor at the time of the suit. That application was dismissed by the Court of first instance after recording evidence and on the finding that Raunak Husain was of age on the date of the institution of the suit. Against this order an appeal was preferred to the learned District Judge. He found that there was "ample evidence on the record to show that he (Raunak Husain) was of age on the date of the suit, and that there was no reason for not believing the evidence." He accordingly on the 6th of July 1904 dismissed the appeal. On the 2nd August 1904 the present suit was instituted. The plaint no doubt contains statements to the effect that the proceedings taken by Ghasi Ram in obtaining the decree of the 29th of June 1903 were fraudulent. But it contains no specific allegation as to what constituted the fraud. At the trial no evidence of fraud was adduced. The only

ground on which the validity of the decree was questioned was the same ground on which the application under section 108 of the Code of Civil Procedure had been made, namely, that the plaintiff Raunak Husain was a minor on the date of the institution of Ghasi Ram's suit. The learned Subordinate Judge has come to a conclusion different from that at which he himself had arrived in the proceedings under section 108 and also from the conclusion of the learned District Judge in that case. He has not only declared that the decree is ineffectual as against the plaintiff, but he has set it aside in its entirety. In our opinion, if the suit was maintainable and the finding correct, the only decree to which the plaintiff was entitled was a decree declaring that the decree of 29th June 1903 would not affect any rights possessed by him. The defendant comes here in appeal. We may observe at the outset that we afforded to the parties an opportunity of compromising the matter, but they have not availed themselves of it. We have heard the learned advocates for the parties and considered the evidence on the record. In our opinion the appeal must succeed. On the merits, the evidence as to the age of the plaintiff is far from conclusive. It appears that on the 17th of April 1902, that is, nine months before the suit of Ghasi Ram was instituted, the plaintiff executed a sale-deed as a person of full age, and got it registered. He also filed objections under section 278 of the Code of Civil Procedure as a person of full age. In our opinion, the reasons given by the learned Subordinate Judge for preferring the evidence of the witnesses for the plaintiff to that of the witnesses for the defendant are not convincing. But, apart from this, the decision of the Court in the case under section 108 in our opinion precludes the plaintiff from maintaining the present suit on the same grounds. We think the principle in *Puran Chand* v. *Sheodat Rai* (1) applies. The learned advocate for the respondent relies upon the ruling of their Lordships of the Privy Council in *Khagendra Nath Mahata* v. *Pran Nath Roy* (2). In that case the whole suit was attacked on the ground of fraud from beginning to end. Under those circumstances it was held that the dismissal of a previous application under section 108 did not bar the suit. The following observations of their

(1) (1906) I. L. R., 29 All., 212. (2) (1902) I. L. R., 29 Calc., 395.

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Lordships at page 399 seem to us to tell against the respondent:—"It is therefore necessary to ascertain what are the true grounds and scope of the present suit in order to see whether the refusal of the application under the sections specified has already determined the question now raised." In the present case the question now raised was considered and determined against the plaintiff in the proceedings under section 108. For the above reasons we allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

Before Mr. Justice Aikman.

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June 11.

UMED (JUDGMENT-DEBTOR) v. JAS RAM (DECREE-HOLDER).*

Civil Procedure Code, sections 311, 312 *and* 313—*Execution of decree—Sale in execution—Objection subsequently taken by the judgment-debtor that the property sold was not legally saleable—Estoppel.*

Held that a judgment-debtor who might have raised objections to a sale in execution of a decree against him, but who has refrained from doing so, and who might have appealed against the order for sale, has no right, after the sale has been carried out, to prefer an objection that the property sold was not legally saleable. *Ramchhaibar Misr* v. *Bechu Bhagat* (1) and *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (2) followed.

THIS was an appeal by a judgment-debtor against whom a decree had been passed under section 90 of the Transfer of Property Act. On the 16th of February 1906 the decree-holder applied for the attachment of a house and certain trees in execution of this decree. The property was attached on the 24th of March 1906 and the sale was fixed for the 31st of May 1906, on which date the property was sold and purchased by one Hira Lal, who was apparently the son of the decree-holder. On the 12th of June 1906 the judgment-debtor filed an objection to the sale on the ground that the property sold was not legally saleable in execution of the decree against him, inasmuch as the house belonged to and was occupied by him as an agriculturist and the trees stood on his occupancy holding. Both the decree-holder and the auction-purchaser were made parties to the application.

* Second Appeal No. 48 of 1907, from a decree of J. H. Cuming, Esq., Additional District Judge of Aligarh, dated the 29th of October 1906, reversing a decree of Maulvi Mubarak Husain, Munsif of Bulandshahr, dated the 28th of July 1906.

(1) (1885) I. L. R., 7 All., 641. (2) (1899) I. L. R., 26 Calc., 727.

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The decree-holder alone resisted the application. He denied that the house was occupied by the judgment-debtor as an agriculturist.

The Court of first instance (Munsif of Bulandshahr) sustained the objection of the judgment-debtor and set aside the sale. On appeal the lower appellate Court (Additional District Judge of Aligarh) reversed the Munsif's order and dismissed the objection. The judgment-debtor appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

AIKMAN, J.—This is an appeal by a judgment debtor against whom a decree was passed under section 90 of the Transfer of Property Act. On the 16th of February 1906 the respondent decree-holder applied for the attachment of a house and certain trees in execution of this decree. The property was attached on the 24th of March 1906 and sale was fixed for the 31st of May 1906, on which date the property was sold and purchased by one Hira Lal, who is apparently son of the decree-holder. On the 12th of June 1906 the judgment-debtor filed an objection to the sale on the ground that the property sold was not legally saleable in execution of the decree against him, inasmuch as the house belonged to and was occupied by him as an agriculturist and the trees stood on his occupancy holding. Both the decree-holder and the auction-purchaser were made parties to the application. The decree-holder alone resisted the application. He denied that the house was occupied by the judgment-debtor as an agriculturist.

The Munsif sustained the objection of the judgment-debtor and set aside the sale. On appeal the learned Additional Judge reversed the Munsif's order and dismissed the objection. The judgment-debtor comes here in second appeal.

Section 313 of the Code of Civil Procedure allows the purchaser at a sale in execution of a decree to apply to the Court to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein. But that section does not recognise any right in the judgment-debtor to file such an objection after sale. No doubt the judgment-debtor might before sale object that the property attached is not

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legally saleable in execution of the decree. Such an objection would be clearly a matter falling within clause *(c)* of section 244 of the Code. But in this case the learned Judge finds that the judgment-debtor was a party to the order for sale and that he knew of the proposed sale. He holds that, this being so, it was not open to him to allow the sale to take place and then file an objection that the property was not saleable. In the case relied on by the Court below, namely, *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (1) the learned Judges at page 732 of the judgment say :—"A difficulty arises in this wise :—An order for sale was made and in furtherance of that order the property was sold. Whatever may be the effect of that sale, if the judgment-debtors were parties to that order, or were aware of it and did not appeal against it, they are now precluded from questioning the propriety of that order, and consequently of the sale that has taken place under the order." This is clearly an authority in support of the view taken by the learned Additional Judge and I see no reason to dissent from it. It also appears to me to be in accordance with what was said by Oldfield, J., in the case *Ramchhaibar Misir* v. *Bechu Bhagat* (2). There, after a sale had taken place, the judgment-debtor put in an application to the effect that the property sold was a right of occupancy tenure and not saleable by law. Oldfield, J., as to this said :—"It is an objection which the judgment-debtor might have taken at the time of attachment prior to the sale, but it is not one he can take after the sale under section 311 so as to afford a ground under section 312 for setting aside the sale." It is clear that section 311 does not apply. In my opinion a judgment-debtor who might have raised objections prior to the sale, but who has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable. As the learned Additional Judge remarks, "to hold otherwise would only be to encourage deliberate and mischievous procrastination." For the above reasons the appeal in my opinion fails, and I dismiss it with costs.

Appeal dismissed.

(1) (1899) I. L. R., 26 Calc., 727. (2) (1885) I. L. R., 7 All., 641.

Before Mr. Justice Banerji.

1907
June 13.

RAM NARAIN (DEFENDANT) *v.* UMRAO SINGH (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 29—*Attachment before judgment—Suit for compensation—Limitation—Terminus a quo.*

Held that the limitation applicable to a suit for damages on account of the alleged unlawful attachment before judgment of a shop belonging to the plaintiff was that prescribed by article 29 of the Indian Limitation Act, 1877, and that limitation began to run from the date of the attachment. *Murugesa Mudaliar* v. *Jattaram Davy* (1), *Multon Chand Kanyalal* v. *Bank of Madras* (2) and *Ram Singh Mohapattur* v. *Bhottro Manjee Sonthal* (3) followed. *Surajmal* v. *Manekchand* (4) distinguished.

Semble that such an attachment, if wrongful, is not a continuing wrong within the meaning of section 23 of the Indian Limitation Act, 1877

THE facts of this case are as follows: —

One Deokinandan brought a suit for recovery of the amount of two promissory notes, alleged to have been executed in favour of one Ram Narain by one Chunni Lal, against the sons of Chunni Lal, and caused a cloth shop kept by Umrao Singh to be attached before judgment on the 29th of November 1902. Ram Narain had assigned the promissory notes to Deokinandan. The shop of Umrao Singh remained under attachment till the 20th May, 1903, when the suit was dismissed. On the 17th of January, 1905, the present suit was brought by Umrao Singh for compensation for loss of profit, servants' wages and rent of the shop, and for damage to the cloth locked up in the shop during the period of the attachment. The defendants were Deokinandan and Ram Narain. It was alleged that the latter fictitiously transferred the promissory notes to the former and was the person who in fact had brought the suit on the promissory notes and caused the attachment to be made. It was contended on behalf of Ram Narain that the suit was barred by limitation under article 29. The Court of first instance (Munsif of Etah) held that the article applicable was article 36; that the wrong done to the plaintiff was a continuing wrong within the meaning of section

* Second Appeal No. 73 of 1906, from a decree of Babu Khettar Mohan Ghose, Additional District Judge of Aligarh, dated the 13th of November 1905, confirming a decree of Munshi Chhajju Mal, Munsif of Etah, dated the 17th of May 1905.

(1) (1900) I. L. R., 23 Mad., 621.
(2) (1903) I. L. R., 27 Mad., 346
(3) (1875) 24 W. R., 298.
(4) 6 Bombay Law Reporter, 704.

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23 of the Limitation Act, and that the claim was within time. That Court decreed the suit and its decree was affirmed by the lower appellate Court (Additional District Judge of Aligarh), which was of opinion that article 49 governed the suit.

The defendant Ram Narain appealed to the High Court.

Mr. *B. E. O'Conor* and Munshi *Gulzari Lal*, for the appellant.

Lala *Girdhari Lal Agarwala*, for the respondent.

BANERJI, J.—The only question in this appeal is whether the claim of the plaintiff respondent is barred by the law of limitation and what is the article of the second schedule to the Limitation Act which governs the case. The suit was one for compensation and was brought under the following circumstances. Deokinandan, defendant, brought a suit for recovery of the amount of two promissory notes, alleged to have been executed in favour of Ram Narain, appellant, by one Chunni Lal, against the sons of Chunni Lal, and caused a cloth shop kept by the plaintiff to be attached before judgment on the 29th of November, 1902. Ram Narain had assigned the promissory notes to Deokinandan. The shop of the plaintiff remained under attachment till the 20th May, 1903, when the suit was dismissed. On the 17th of January, 1905, the present suit was brought for compensation for loss of profit, servants' wages and rent of the shop, and for damage to the cloth locked up in the shop during the period of the attachment. The defendants were Deokinandan and the appellant Ram Narain. It was alleged that the latter fictitiously transferred the promissory notes to the former and was the person who in fact had brought the suit on the promissory notes and caused the attachment to be made. It was contended on behalf of Ram Narain that the suit was barred by limitation under article 29. The Court of first instance held that the article applicable was article 36; that the wrong done to the plaintiff was a continuing wrong within the meaning of section 23 of the Limitation Act, and that the claim was within time. That Court decreed the suit and the decree has been affirmed by the lower appellate Court, which was of opinion that article 49 governed the suit. Ram Narain has preferred this appeal. It is contended on his behalf that the article applicable is article 29, the suit being

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one for compensation for wrongful seizure under legal process and that the limitation should be computed from the date of attachment.

The contention appears to me to be valid. Article 36 of the second schedule is a general article governing suits for compensation for torts to which no special article applies. Article 29 provides for suits for compensation for wrongful seizure of moveable property under legal process, and if the present suit is one of the description mentioned in that article it cannot be governed by article 36. The plaintiff's allegation is that in a suit brought against the sons of Chunni Lal his shop was attached before judgment by actual seizure. This seizure is said to have been wrongful and the damages claimed are in respect of the seizure. It is true that the damages claimed do not consist of the value of the articles attached, but are damages which are alleged to have been sustained as a result of the attachment. This, however, does not seem to make any difference. As observed by the Madras High Court in *Murugesa Mudaliar* v. *Jattaram Davy* (1):—"Article 29 is quite general in its terms and was intended to apply to all cases where the alleged wrongful seizure was made under legal process." In *Multan Chand Kanyalal* v. *Bank of Madras* (2) in which compensation was claimed for deterioration in the quality and diminution in the quantity of certain jaggery attached at the instance of the defendants, the same High Court held that article 29 applied. The present suit being one for compensation for wrongful seizure under a process of Court, it is governed by article 29, which is a special article providing for such a suit. Article 49 has, in my opinion, no application to a suit of this description. It clearly applies to a case in which moveable property is wrongfully taken or detained by the defendant and not by the Court in execution of a legal process. The Court of first instance in support of its view that article 36 applied to the case relied on the ruling of the Bombay High Court in *Surajmal* v. *Manekchand* (3). That, however, was a case in which attachment was made not by actual seizure but by the issue of a prohibitory order under sections 484 and 268 of

(1) (1900) I. L. R., 23 Mad., 621. (2) (1903) I. L. R., 27 Mad., 346.
(3) 6 Bombay Law Reporter, 704.

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the Code of Civil Procedure. It was on this ground that Batty, J., held that article 36 and not article 29 applied. In *Ram Singh Molapattur* v. *Bhottro Manjee Sonthal* (2), which was a suit for compensation for the wrongful seizure of the plaintiff's bullocks in execution of a decree against a third party, article 30 of schedule II of Act No. IX of 1871, which corresponded to article 29, schedule II of Act No. XV of 1877, was held to apply, and it was also held that limitation ran from the date of seizure. As the suit of the present plaintiff was brought after the expiry of more than one year from the date of the seizure it was barred by limitation. As the suit was instituted after one year even from the date of the release of the property, it is unnecessary to consider whether section 23 of the Limitation Act applied and whether this was a case of a continuing wrong. Had I to decide that question, I should have considerable difficulty in holding that it was a continuing wrong, as the wrong to the plaintiff was complete as soon as his goods were seized. That the intention of the Legislature was not to make section 23 applicable to such a case is indicated by articles 19 and 42 under which limitation is to be computed from the date of the cessation of the wrong.

For the above reasons I am of opinion that this appeal must prevail, the claim being time-barred. I accordingly allow the appeal, set aside the decrees of the Courts below, and dismiss the suit with costs in all Courts.

Appeal decreed.

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June 17.

Before Mr Justice Aikman and Mr. Justice Griffin.

ABDUL MAJID (DEFENDANT) v. AMOLAK (PLAINTIFF) AND RANJI LAL (DEFENDANT).*

Pre-emption—Price stated in sale-deed alleged to be fictitious—Burden of proof.

When a plaintiff pre-emptor comes into Court alleging that the price entered in the sale-deed is fictitious, it rests on him to give some *primâ facie* evidence that this is the case. But comparatively slight evidence is sufficient for such purpose, and it will then be for the parties to the sale to show that the price alleged to have been paid was actually paid. *Bhagwan*

* Second Appeal No. 640 of 1906, from a decree of H. W. Lyle, Esq., District Judge, Agra, dated the 28th of June, 1906, confirming a decree of Munshi Shankar Lal, B. A., Subordinate Judge, Agra, dated the 26th of August, 1905.

(1) (1875) 24 W. R., 298.

Singh v. *Mahabir Singh* (1), *Sheo Pargash Dube* v. *Dhaneaj Dube* (2) and *Agar Singh* v. *Raghuraj Singh* (3) referred to. *O'Conor* v. *Ghulam Haidar* (4) not followed.

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THE plaintiff in this case came into Court on the allegation that the defendant No. 2 had sold to the other defendant his zamindari property under a sale deed dated the 26th of April 1904; that through fear of pre-emption a sum of Rs. 3,500 had been entered as the purchase money in the sale-deed, but that as a matter of fact the sale transaction was effected for Rs. 1,200, which the plaint stated to be the market value of the property. The plaintiff in his plaint stated that he was willing to pay the vendee Rs. 1,200 or any amount which the Court might adjudge to be the proper value of the property sold. The defendant vendee pleaded that the entire purchase money entered in the sale-deed had been paid. The Court of first instance (Subordinat Judge of Agra) found on the evidence that the sale price entered in the sale-deed was "at an unheard-of rate." It did not accept the sum entered in the sale-deed as the real price, but determined that the real price was Rs. 1,733 and gave plaintiff a decree conditional on his paying this amount.

The defendant vendee appealed and in his petition of appeal took exception to the sale consideration as fixed by the first Court. On appeal the lower appellate Court (District Judge of Agra) held, with reference to the evidence as to the income of the village, that the amount entered in the sale-deed, which is upwards of 67 years' purchase, must be considered to be a fancy price. That Court held that the evidence adduced by the plaintiff had the effect of shifting to the defendant vendee the burden of proving that the sum entered in the sale-deed had been actually paid. It declined to accept as conclusive evidence the fact that Rs. 3,000 had been paid in the presence of the Sub-Registrar, and on consideration of the evidence as a whole agreed with the lower Court that there was absolutely no reliable proof as to what was really paid, and held that the Court was right in adopting the fair market value as the best indication of what the price was. The decree of the first Court was accordingly confined. The defendant vendee appealed.

Mr. *G. P. Boys*, for the appellant.

(1) (1882) I. L. R., 5 All., 184.
(2) (1887) I. L. R., 9 All., 226.
(3) (1887) I. L. R., 9 All., 471.
(4) (1906) I. L. R., 28 All., 617.

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Mr. *B. E. O'Conor* and Pandit *M. L. Sandal*, for the respondents.

AIKMAN and GRIFFIN, JJ.—This is an appeal by the defendant vendee in a suit to establish a right of pre-emption. A preliminary objection is raised by the learned counsel for the respondents on the ground that the memorandum of appeal was not properly stamped when it was presented. The stamp on the memorandum of appeal was found to be deficient, but the deficiency was made good within the time fixed. In our opinion the case falls within the purview of section 582*(a)* of the Code of Civil Procedure and we repel the preliminary objection.

The plaintiff respondent came into Court on the allegation that the defendant No. 2 had sold to the other defendant his zamindari property under a sale-deed dated the 26th of April 1904; that through fear of pre-emption a sum of Rs. 3,500 had been entered as the purchase money in the sale-deed, but that as a matter of fact the sale transaction was effected for Rs. 1,200, which the plaint stated to be the market value of the property. The plaintiff in his plaint stated that he was willing to pay the vendee Rs. 1,200 or any amount which the Court might adjudge to be the proper value of the property sold. The defendant vendee pleaded that the entire purchase money entered in the sale-deed had been paid. The Court of first instance found on the evidence that the sale price entered in the sale-deed was "at an unheard of rate." It did not accept the sum entered in the sale-deed as the real price, but determined that the real price was Rs. 1,733 and gave plaintiff a decree conditional on his paying this amount.

The defendant vendee appealed and in his petition of appeal took exception to the sale consideration as fixed by the first Court. On appeal the learned District Judge held, with reference to the evidence as to the income of the village, that the amount entered in the sale-deed, which is upwards of 67 years' purchase must be considered to be a fancy price. The learned Judge rightly remarks that it cannot be disputed that "if a purchaser is prepared to pay a fancy price for a property, a pre-emptor is bound to pay that price also," and that "if the actual price paid is satisfactorily established that is an end of the matter." He then referred to the previous decisions of this Court as indicating the

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principles which should guide Courts in matters of this kind. He held that the evidence adduced by the plaintiff had the effect of shifting to the defendant vendee the burden of proving that the sum entered in the sale-deed had been actually paid. He declined to accept as conclusive evidence the fact that Rs. 3,000 had been paid in the presence of the Sub-Registrar, and on consideration of the evidence as a whole he agreed with the lower Court that there was absolutely no reliable proof as to what was really paid, and held that the Court was right in adopting the fair market value as the best indication of what the price was. The defendant vendee comes here in second appeal.

It is contended on his behalf that the Court below was wrong in rejecting the evidence contained in the deed and in the admission before the registering officer, without rebutting evidence that any portion of the alleged sale price had not in fact been paid or had been returned, and in support of the contention reliance is placed on the decision of the Court in *B. E. O'Conor* v. *Ghulam Haidar* (1). In that decision no reference is made to any previous rulings of this Court, and if it is opposed to those rulings we cannot look upon it as over-riding the authority of a series of cases in which the same principle has been consistently laid down. In the case of *Bhagwan Singh* v. *Mahabir Singh* (2) it was held that in a suit to enforce a right of pre-emption in which the plaintiff impugns the correctness of the price stated in the instrument of sale, although the burden of proof *primâ facie* is on him to show that the property has been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case, and when such evidence is given it rests upon the defendants vendor and vendee to prove by cogent evidence that the stated price is the correct one. The ruling was followed in the case of *Sheo Pargash Dube* v. *Dhanraj Dube* (3). The following extract from the judgment of Edge, C.J., has a direct bearing on this case. Referring to the rule laid down in the case last cited, the learned Chief Justice says:—"That rule is that, in the first instance, the plaintiff who alleges the price to be fictitious must give some *primâ facie* evidence which

(1) (1906) I. L. R., 28 All., 617. (2) (1882) I. L. R., 5 All., 184.
(3) (1887) I. L. R., 9 All., 225.

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would lead to the presumption that the price mentioned in the sale-deed was not the real or true price. Having done that, it lies upon the vendor and vendee, who set up the price as true and genuine, to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. As a general rule how can that be done? The plaintiff in a case of this kind would not be a party to the transaction out of which the sale to the stranger arises. He would not, as a rule, have any actual knowledge of what the real price was. In the majority of cases the only *primâ facie* evidence which the plaintiff pre-emptor could produce would be either evidence showing that the vendor or the vendee had made an admission that the price was fictitious, and this could only happen in rare cases, or evidence showing that the market value of the property was so much less than the alleged price as would lead any reasonable man to come to the conclusion that the alleged contract price was not the real price." Again, in the case of *Agar Singh* v. *Raghuraj Singh* (1) it was held that in suits for pre-emption where the Court has come to the conclusion that the price alleged in the deed of sale is not the true contract price, and where it cannot ascertain the true price by reason either that the vendor and vendee refused to disclose the same by their own evidence, or their evidence cannot be believed, the Court should ascertain if possible what was the market price of the property in dispute at the time of the sale and accept the market price as the probable price agreed upon between the parties. In our opinion the decisions just cited are distinct authority for the course adopted by the Courts below. The plaintiff by showing that the price entered in the sale-deed was greatly in excess of the market value of the property and by giving evidence of the price paid on sales of other property in the village and in the vicinity was held to have discharged the burden which *primâ facie* lay on him. That being so, the onus was transferred to the defendants and their evidence to prove that Rs. 3,500 was actually paid was not accepted by the Courts below. In our opinion on the authorities cited this appeal cannot succeed. We accordingly dismiss it with costs.

Appeal dismissed.

(1) (1887) I. L. R., 9 All., 471.

Before Mr. Justice Richards and Mr Justice Griffin.

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June 27.

GAURI SAHAI (DECREE-HOLDER) v. ASHFAK HUSAIN AND OTHERS (JUDGMENT-DEBTORS) *

Decree ex parte—Civil Procedure Code, section 108—Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—Limitation.

A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March, 1902. Subsequently a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November, 1904. As against this defendant the decree was made absolute on the 27th of November, 1905

Held that the orders of the 25th August, 1900, and the 16th November, 1904, between them, operated as one decree for the sale of the mortgaged property; that the joint effect of the orders of the 21st December, 1901, and the 27th November, 1905, was to make absolute this decree, and that an application for execution made on the 21st December, 1905, was not barred by limitation. *Bhura Mal* v. *Har Kishan Das* (1), *Sham Sundar* v. *Muhammad Ihtisham Ali* (2) and *Shaida Husain* v. *Hub Husain* (3) referred to.

THE suit out of which this appeal arose was brought to enforce payment of a mortgage by sale of the mortgaged property according to the provisions of the Transfer of Property Act. There were a number of defendants to the suit representing the mortgagors. A decree against all the defendants was obtained on the 25th August, 1900. On the 21st December, 1901, the decree was made absolute. One of the defendants was, however, a lady named Sakina Bibi, evidently a *pardah-nashin* lady. On whom personal service of the plaint in the suit presented some difficulties. The decree of the 25th August, 1900, was *ex parte* against this lady, and she applied under section 108 of the Code of Civil Procedure to set it aside. Her application was refused, but on appeal to the High Court she succeeded, and on 11th March, 1902 the High Court set aside the decree "as against her" and remanded the case. A decree on the merits was then pronounced against Sakina Bibi. She appealed again to the High Court, but her appeal was dismissed, and on the 16th November, 1904, the High Court confirmed the Court below.

* First Appeal No 8 of 1907, from a decree of Sheikh Maula Bakhsh, Additional Subordinate Judge of Moradabad, dated the 17th of April 1906.

(1) (1902) I. L. R., 24 All., 363 (2) (1905) I. L. R., 27 All., 501.
(3) Weekly Notes, 1902, p. 184.

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On the 15th February 1905 the plaintiffs applied to make the decree absolute. The judgment debtors other than Sakina Bibi objected that the decree against them had already been made absolute. This objection was allowed, but the decree was made absolute against Sakina. The plaintiffs then applied for execution, and the defendants other than Sakina objected that the decree was barred by limitation. The executing Court (Subordinate Judge of Moradabad) held that execution of the decree was barred so far as the other judgment-debtors were concerned but not as against Sakina Bibi. Against this order the decree-holder appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Maulvi *Muhammad Ishaq*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS and GRIFFIN, JJ.—The suit, out of which this execution appeal arises, was brought to enforce payment of a mortgage by sale of the mortgaged property according to the provisions of the Transfer of Property Act.

There were a number of defendants to the suit representing the mortgagors. A decree against all the defendants was obtained on the 25th August, 1900. On the 21st December, 1901, the decree was made absolute.

One of the defendants was, however, a lady named Sakina Bibi, evidently a *pardah-nashin* lady, on whom personal service of the plaint in the suit presented some difficulties. The decree of the 25th August, 1900, was *ex parte* against this lady and she applied under section 108 of the Code of Civil Procedure to set it aside; her application was refused, but on appeal to the High Court she succeeded, and on 11th March, 1902, the High Court set aside the decree "as against her" and remanded the case. A decree on the merits was then pronounced against Sakina Bibi. She appealed again to the High Court but her appeal was dismissed, and on the 16th November, 1904, the High Court confirmed the Court below.

On the 15th February, 1905, the plaintiffs applied to make the decree absolute: the judgment-debtors other than Sakina Bibi objected that the decree against them had already been made absolute: this objection was allowed, but the decree was made absolute

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against Sakina. The plaintiffs then applied for execution, and the defendants other than Sakina object that the decree is barred by limitation. Hence the present appeal. The decree-holders are certainly very unfortunate if this contention of the respondents is to prevail. The mortgage was a joint mortgage. The plaintiffs could not have sued the respondent to this appeal without making Sakina a party. When the decree was set aside against Sakina the decree still remained a decree for the sale of all the mortgaged property. After the remand the Court below and the High Court decreed the sale of all the mortgaged property and not merely the interest of Sakina Bibi.

The plaintiff has since the year 1900 been engaged in prosecuting what has turned out to be an honest and *bonâ fide* claim without any unnecessary delay, and having at last succeeded, if the decree below stands, he will be deprived altogether of the fruits of his litigation.

The contention of the respondent is that there are two decrees, one against them and the other against Sakina, and that the decree against them is barred by limitation. Now, having regard to the fact that the mortgage was a joint mortgage, a decree for the sale of the property against the respondents in the absence of Sakina Bibi would have been contrary to the provisions of the Transfer of Property Act: so also would have been a decree against Sakina Bibi in the absence of the respondents. In the connected appeal the lower Court has held that the decree even against Sakina Bibi cannot be executed. Mr. *Moti Lal* says that when the High Court set aside the *ex parte* decree it should perhaps have set aside the whole decree and not merely the decree as against Sakina Bibi; but it did not do so; it set aside only against Sakina. He referred us to the case of *Bhura Mal* v. *Har Kishan Das* (1). This case certainly suggests that the Court should have set aside the whole decree. But this seems to us a pure technicality. The High Court in dealing with the appeal of Sakina on the 11th March 1902 in effect said:—"We set aside the decree because we hold that Sakina was not served: the case will be remanded and tried out on the merits in her presence, but the other defendants who were present and represented at

(1) (1902) I. L. R., 24 All., 383

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the previous hearing will not be allowed to reopen the case." On the 15th February 1905 the plaintiffs applied against all the defendants to make absolute the decree of the 16th November, 1904, treating that decree as the decree in the suit. The order asked for was made, but only against Sakina. This application would be a "step in aid of execution" unless the argument of the respondents is sound, namely, that there are two separate and distinct decrees. We have already shown that in a suit like the present any decree except one joint decree would be contrary to law. In *Sham Sundar* v. *Muhammad Ihtisham Ali* (1) it was held that in a suit for foreclosure there could only be one decree. The principle of that ruling is, in our opinion, applicable in the present case. We think as far as possible we ought to construe the decrees and orders of Courts of justice as having been in accordance with and not in opposition to the law. Acting on this principle we hold that the orders of the 25th August 1900 and 16th November, 1904, between them, operate as one decree for the sale of the mortgaged property: that the joint effect of the orders of 21st December, 1901 and 27th November, 1905 was to make absolute this decree, and that the application for execution made on 21st December, 1905, was not barred by limitation. We have also been referred to the case of *Shaida Husain* v. *Hub Husain* (2). In that case as in the present case a decree obtained against several mortgagors was set aside against one of them on an application under section 108 of the Code of Civil Procedure; the case was remanded, and the defendant against whom the decree was set aside succeeded in reducing the amount due on foot of the mortgage. This Court made a decree regulating how the decree was to be executed against the several defendants judgment-debtors. It is argued that the Court here recognized that there were two separate decrees. The learned Chief Justice after stating the facts and referring to the case of *Bhura Mal* v. *Har Kishan Das* says:—"This is an anomalous state of things and could not, as it seems to us, have been contemplated by the framers of the Code." In the present case the decree against Sakina is for a larger amount than the decree against the other defendants, but Mr. *Muhammad Ishaq* has wisely waived in open

(1) (1905) I. L. R., 27 All., 501 (2) Weekly Notes, 1902, p. 184.

Court any claim to execute the decree against any of the defendants for any greater sum than the sum decreed against the defendants other than Sakina. We do not think that there is anything inconsistent with our judgment in the case just referred to. On the contrary we think that the Court was clearly of opinion that there could only be, in effect, one decree in a suit like the present. We allow the appeal and set aside the decree of the lower appellate Court and direct that court to restore the execution case and proceed according to law, allowing the decree to be executed against all the judgment-debtors for the amount decreed against the defendants other than Sakina Bibi just as if the decree against the latter had never been set aside.

Appeal decreed.

APPELLATE CIVIL.

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April 29.

Before Sir George Knox, Acting Chief Justice, and Mr Justice Aikman.

GIRRAJ SINGH AND OTHERS (PLAINTIFFS) *v.* MUL CHAND (DEFENDANT).*

Act No. XV of 1877 *(Indian Limitation Act), schedule II, articles* 61 *and* 83—*Limitation—Suit on bond to recover money of which a third party has in fact had the benefit—Compromise of suit by heirs of obligor—Suit to recover money paid under compromise.*

U S. borrowed money on a bond from U.R The sole obligor of the bond was U. S., but the money was in fact borrowed for the use of, and was paid to, one M. From time to time the original bond was renewed, and ultimately U. R. sued upon the last bond and obtained a decree for a large sum of money against the heirs of U. S The defendants appealed to the High Court, but pending the appeal entered into a compromise with the plaintiff on the 2nd of January 1900, whereby they agreed to pay to the plaintiff the sum of Rs. 51,000 and costs of the High Court. Upon the 5th of November 1902 the heirs of U. S. paid to the plaintiff decree-holder in pursuance of this compromise Rs. 40,000, and on the 17th of July 1903 they instituted a suit against M. to recover the amount so paid and their costs. *Held* that on the facts U. S was not a surety for M. but the principal debtor, although the money was borrowed for M 's benefit; that the payment made on the 5th of November 1902 in pursuance of the compromise referred to above was not gratuitous, and that the heirs of U. S. were entitled to recover from M. the sum of Rs 40,000 so paid with interest, but not the costs of the High Court, in respect of which the suit was barred.

* First Appeal No 75 of 1904, from a decree of H. David, Esq., Subordinate Judge of Meerut, dated the 26th of November 1903.

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Lewis v. *Campbell* (1) and *Ram Tuhul Singh* v. *Biswesur Lall Saloo* (2) referred to by KNOX, A. C. J.

THE facts of this case sufficiently appear from either of the judgments.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellants.

Sir *Walter Colvin* and Babu *Jogindro Nath Chaudhri*, for the respondent.

KNOX, ACTING C.J.—The present appeal arises out of a suit brought by Rao Girraj Singh and others to recover a sum of Rs. 44,614-4-9 from one Mul Chand, who died after the case was decided in the Court below and who is represented in this Court by the respondents. The case set up by the plaintiffs is that Mul Chand, who was an old and trusted servant of their father, Rao Umrao Singh, wished to borrow a sum of Rs. 2,000 from Seth Udai Ram. The latter declined to lend the money to Mul Chand except upon a bond executed by Rao Umrao Singh. At the request of Mul Chand, Rao Umrao Singh did execute a bond on the 30th November 1870 in favour of Udai Ram, Mul Chand undertaking to pay off the bond when due. He did not do so; but, at his request, Rao Umrao Singh executed fresh bonds from time to time on the same understanding. The latest of these was a bond for Rs. 15,000, dated the 1st November 1887, payable in two years. No payment having been made on account of the bond, the obligee Udai Ram brought a suit on the 30th October 1895 against Rao Umrao Singh to recover Rs. 15,000 principal and Rs. 22,139-6-6 interest due under the last bond. The suit was at first dismissed on a technical ground, but on appeal the case was remanded by this Court and resulted in a decree for Rs. 48,288-15-6 in favour of the creditor. During the pendency of this suit, Rao Umrao Singh died and his sons were brought upon the record as his legal representatives. They appealed against the decree, but whilst the appeal was pending in this Court, they, on the advice of their counsel, entered into a compromise with the creditor, whereby they bound themselves to pay Rs. 51,000 to the decree-holder. On this compromise the appeal was withdrawn.

On the 5th November 1902, they paid a sum of Rs. 40,000 out of this Rs. 51,000. They have now sued to recover from

(1) (1842) 8 C. B., 545. (2) (1875) L. R., 2 I. A., 131.

Mul Chand this amount with interest, together with a sum of Rs. 954-9-3 being costs incurred by them in the High Court.

The defence to the suit was—1st, that the claim against the defendant was barred by limitation on the ground that the cause of action against the defendant arose, not on the 5th November 1902, when the plaintiffs paid the Rs. 40,000, but on the 31st October 1889, the date when the last bond executed by Rao Umrao Singh fell due; next, that the debt due by Rao Umrao Singh could not have been legally enforced against the plaintiffs or their property and that they wrongfully entered into the compromise This amounts to the contention that the payment of Rs. 40,000 by the plaintiffs was a gratuitous payment which they cannot recover. The learned Subordinate Judge dismissed the suit. He held that (i) Mul Chand was the actual borrower of the Rs. 2,000 originally lent by Udai Ram in 1870, and that Umrao Singh was, so far as Udai Ram was concerned, surety for Mul Chand. Similarly, he held in respect of the subsequent bonds that in them all Mul Chand was the principal debtor and Umrao Singh the surety. The last bond so renewed was that of 1887, (ii) the payment made by Rao Girraj Singh and others was partly on account of sums due upon the bond executed in 1887 and partly on account of costs of the appeal preferred by Udai Ram against the order dismissing his suit. But he went on to hold that when Umrao Singh's sons made the payment to Udai Ram, or rather to Nand Kishore, the adopted son of Udai Ram, deceased, on November the 5th, 1902, they made payment of a debt which was barred by time as against the principal debtor, and further that when they entered into the compromise with Nand Kishore and allowed a decree to pass against them, they did an act wrongful to the principal.

On these two grounds he dismissed the suit, and hence this appeal.

The most important issue which we have to determine in this appeal is the relationship in which the principal actors in the transaction of 1870 and in the final renewal of that transaction in 1887 stood to each other. Udai Ram was the lender of the money in 1870, the obligee in the renewal of the bond in 1887. Was the borrower of the money in 1870 and the obligor in 1887,

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Mul Chand, and was Umrao Singh his surety, as the Court below has held, or was the borrower in 1870 and the obligor in 1887 Rao Umrao Singh?

To quote from the words used in the first plea taken in the memorandum of appeal, was it the case that between Udai Ram and Mul Chand "the relationship of lender and borrower did not subsist," and was Udai Ram neither bound nor entitled to sue Mul Chand for the recovery of the debt in suit?

The original bond in 1870, the subsequent bonds renewing the same, including the last bond in 1887, were all of them bonds executed by Umrao Singh and Umrao Singh only. Mul Chand's name did not appear on any one of them. They were all registered bonds, and if they stood alone there could be but one answer to the question stated above and that answer was that Umrao Singh was the obligor. The only other evidence pointed out to us as bearing upon the point is the depositions of Rao Umrao Singh and of Mul Chand. A careful consideration of that evidence makes it impossible to hold otherwise than that the money was lent to Rao Umrao Singh and not to Mul Chand.

At page 7 A we find Umrao Singh deposing as follows:—"Mul Chand said to me:—'Udai Ram does not trust me, I reside at a distant place. Please execute a bond. I am liable to satisfy the same'", and again at page 9 A:—"I had trust in Mul Chand, but the plaintiff had no trust in him, and for this reason I got my name entered in the bond."

It is equally clear from this evidence that, although Rao Umrao Singh borrowed the money, he did so merely to hand it over to Mul Chand. It is not shown anywhere that he derived any benefit from it, but if Umrao Singh had not signed the bond of 1870, Mul Chand would not have obtained an anna of it from Udai Ram, and if Rao Umrao Singh had not renewed the bond, Udai Ram would have long ago sued Rao Umrao Singh upon the original bond.

The Subordinate Judge relies upon a passage in the deposition of Mul Chand (*vide* page 14 A) where he says:—"Rao Umrao Singh used to stand surety for me and signed the bonds in this way on every occasion;" also upon the language contained in the plaint (*vide* paras. 4 and 5); but he does not seem to have given

sufficient weight to the consideration that he was dealing with the terms of a contract reduced to writing, and he has been somewhat lax in admitting evidence which can hardly be brought within any of the provisos to section 92 of the Indian Evidence Act, 1872, nor has he made allowance for the fact that much of the language was due to Indian politeness. Behind all the honeyed speeches was the firm resolve evidenced eventually by the bond, and this resolve was —Udai Ram was not going to lend his money to or upon the signature of Mul Chand. The bond, dated 14th May 1893 (*vide* page 4 A), also points to this conclusion.

Still less can there be any doubt from the evidence that throughout Mul Chand, in 1870 and 1887, intended to pay this money and to indemnify Rao Umrao Singh for any moneys he might have to pay on this account. This is evident from the bond of 14th May 1893 (*vide* page 4 A) and the evidence of Mul Chand (see page 17 A *ad finem*).

No express contract of indemnity, it is true, appears from the evidence, but, as pointed out in Leake upon Contracts (edition 1878, page 77), "a debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or contract for payment may then in general be implied in law without any actual agreement to that effect. See per Maule, J., in *Lewis* v. *Campbell* (1)."

The learned advocate for the appellants took his stand upon section 69 of the Indian Contract Act, 1872, but the case seems to fall rather within the words, or at any rate the spirit, of section 70 of the Act. The conduct and language used by Mul Chand on each occasion when the bonds were renewed, if they mean anything at all, mean that Rao Umrao Singh was not intended to pay the money due under the bond gratuitously. The circumstances disclose such a situation as was described by their Lordships of the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lal Sahoo* (2) where they had to consider a converse case, and say :—"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice

(1) (1849) 8 C. B., 545. (2) (1875) L. R., 2 I. A., 131.

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considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation expressed or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt."

The payment by the plaintiffs in the present case was not a voluntary one. It is true that it was arrived at by compromise but the compromise arose out of a suit brought to recover the money, a suit which was stoutly defended, a suit in which the defence was unsuccessful and which Rao Girraj Singh and his party carried into appeal.

In making the payments which they did on the 5th November 1902, the plaintiffs lawfully paid Rs. 40,000, not intending to do so gratuitously, and Mul Chand has enjoyed and still enjoys the benefit thereof.

This determination renders it unnecessary to examine the other pleas raised in appeal, especially as the 6th plea is not pressed.

The appeal must be decreed.

AIKMAN, J.—This appeal arises out of a suit of a somewhat peculiar nature. In the Bulandshahr district there lived one Rao Umrao Singh who owned large estates. He had in his employ one Mul Chand, an old and trusted servant, who had been in his service since the Mutiny. In 1870, Mul Chand wished to purchase some property, and for that purpose he applied to Udai Ram, a money-lender of the Meerut district, for a loan. As Mul Chand was not a resident of those parts and had no property, Udai Ram refused to lend him the money, but offered to let him have the sum he wanted, namely, Rs. 2,000, if his master, Umrao Singh, stood security for him.

Mul Chand accordingly applied to Rao Umrao Singh, and the latter, at Mul Chand's request, executed a bond for Rs. 2,000 in favour of Udai Ram and his father. This bond is printed at page 12 of appellant's book in F. A. No. 236 of 1897. It bears date the 3rd of November 1870, and begins as follows:—"I Rao Umrao Singh, declare as follows:—I have borrowed Rs. 2,000 of the Queen's coin from Lala Khub Chand, and brought it to my use." The obligor covenanted to pay the money on demand

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with interest at the rate of Rs 1-8-0 per cent. per mensem. The loan not having been repaid, the bond was renewed on the 25th October 1876, by the execution of a fresh bond by Rao Umrao Singh for Rs. 3,500, being the principal and interest due on the first bond. In this bond Rao Umrao Singh admitted the money to be due by him and agreed to pay it on demand with interest at the same rate as that fixed in the first bond. The second bond not having been satisfied, Rao Umrao Singh executed on the 15th of November 1879 a third bond in favour of Udai Ram for Rs. 4,000 on account of the amount due by him under the bond of the 25th of October 1876. He covenanted to pay this amount in two years with interest at the same rate as that specified in the previous bonds. This debt not having been paid, Rao Umrao Singh, on the 1st of November 1887, executed a fourth bond for the sum of Rs. 15,000, which, as the bond recites, had been found due by him on account of the bond, dated the 15th of November 1879. He covenanted to pay this amount within two years with interest at the rate of 1 per cent. per mensem. All these bonds were registered, and it will be noticed that in none of them is any mention made of Mul Chand. Mul Chand was examined as a witness in the suit which Udai Ram brought to recover the amount due under the last mentioned bond. His deposition is printed at page 13 of the appellant's paper book in this case. With reference to the bonds he says, at page 17 (*h*):—"On none of the occasions when the bonds were renewed, did the plaintiff (*i.e.*, Udai Ram), consent to my joining the Rao Sahib in the execution of the bond." The last bond not having been satisfied, Udai Ram, on the 30th of October 1895, *i.e.*, just within the six years period of limitation from the date when the money was payable, instituted a suit against Rao Umrao Singh to recover the amount due under the bond which by this time had swelled to upwards of Rs. 37,000. On the 23rd of August 1897 the then Subordinate Judge dismissed Udai Ram's suit on a preliminary point. The plaintiff appealed to this Court, and, on the 12th April 1899, the decree of the Subordinate Judge dismissing the suit was set aside by this Court and the case remanded under section 562 of the Code of Civil Procedure for decision on the merits. Before the suit could be disposed of Rao Umrao

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Singh died and his sons were brought upon the record as his legal representatives. On the 2nd of January 1900 the Subordinate Judge passed a decree against them for Rs. 37,139-6-6, together with interest *pendente lite* and costs; in all for Rs. 43,288-5-11, with future interest at the rate of 6 per cent. per annum. Against this decree the sons appealed to this Court, but, acting on the advice of their counsel, they compromised the case, undertaking to pay a sum of Rs. 51,000 to the plaintiff, and the appeal was thereon withdrawn. Out of this amount of Rs. 51,000, the sons of Umrao Singh paid Rs. 40,000 to Udai Ram on the 5th of November 1902. On the 14th of July 1903 they instituted the suit out of which this appeal arises, to recover from Mul Chand the amount they had paid, namely, Rs. 40,000, together with Rs. 954-9-3, being the costs which they had incurred in the High Court. The suit has been dismissed by the Subordinate Judge, and the plaintiffs come here in appeal.

The costs of the High Court were paid by the plaintiffs on the 29th of the March 1900, *i.e.*, upwards of three years before the institution of the present suit, and the claim for that item is clearly time-barred. Although a plea is taken in the memorandum of appeal in regard to this item, it is not supported. In the plaint in the present suit it is alleged that all the bonds mentioned above were executed "by Rao Umrao Singh as surety for the satisfaction of the creditor and for the benefit of the defendant." It is quite clear, however, from the bonds and from the evidence in the case that Umrao Singh was indebted to Udai Ram as a principal and not as a surety, the only resemblance to a surety being that he himself did not benefit by the money which Udai Ram lent to him on his credit, and that the money was handed over to Mul Chand. The main defences to the suit were that the claim was barred by limitation and that the payment of Rs. 40,000 by the plaintiffs was in reality a gratuitous payment which they were not obliged to make. The learned Subordinate Judge found for the plaintiffs on the issue as to limitation, but he held that the act of the plaintiffs in compromising the case was a wrongful act. He further held in regard to the bond that the transaction, namely, the execution of the bond by Rao Umrao

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Singh, was, so far as Udai Ram was concerned, that of a surety for Mul Chand; that Mul Chand was the principal debtor; that Udai Ram's claim as against him was barred, and that the surety, *i. e.*, Umrao Singh, was therefore absolved from his obligations to discharge the debt. In my opinion this view of the Subordinate Judge cannot be supported. On the bond as it stood the obligor, Umrao Singh, had no defence to Udai Ram's suit, as by it he rendered himself liable as a principal for the amount secured thereby. It appears to me impossible to hold that Rao Umrao Singh was absolved from liability by the failure of Udai Ram to institute a suit against Mul Chand. The evidence leaves no doubt whatever that the money was borrowed by Umrao Singh from Udai Ram for Mul Chand's benefit and at his request, and that the bonds were renewed from time to time at Mul Chand's request. It is further proved in my opinion that Mul Chand undertook to discharge the bonds when they fell due, that is, he undertook to indemnify Udai Ram. The evidence discloses both an express and implied contract to hold Umrao Singh free from liability under the bonds. In his deposition in the suit of Udai Ram, Mul Chand said [see page 15 of the appellant's book between letters *(g)* and *(h)*]:—"If a decree be passed against the Rao Sahib, he will bring a suit against me."

When the bond of the 1st November 1887 was not paid, Mul Chand and Udai Ram endeavoured to get Rao Umrao Singh to renew the bond again, and as an inducement to get him to do so, Mul Chand executed and registered a bond in favour of Rao Umrao Singh. This bond is printed at page 4 of the appellants' book and bears date the 14th of May 1893. Its language throws an important light on the real nature of the transaction. It opens as follows:—

"In 1870 I stood in need of money and could not get it by my own exertions, so my master, Rao Umrao Singh, executed on my request a bond for Rs. 2,000 on the 25th of October 1870, in favour of Udai Ram and made it over to me ..... Subsequently I renewed the said bond from time to time in the aforesaid manner. At last, on the 1st of November 1887, a bond for Rs. 15,000 was executed on the admission of the said Rao Sahib, and I got it registered on the 10th of November 1887. Now the amount due

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under the said bond, including interest, is Rs. 28,000. As the item has largely increased, and with reference to the wording of the bond the aforesaid Rao Sahib is liable therefor, though he has not been benefited by this bond and he signed it for my sake, it is necessary for me to pay this money to the Rao Sahib and I am liable to pay the same to him." Accordingly Mul Chand covenanted to pay to Rao Umrao Singh Rs. 28,000, with interest at at 1 per cent. per mensem, and as security for payment hypothecated some zamindari property belonging to him. Rao Umrao Singh, however, absolutely refused to renew his bond in favour of Udai Ram and declined to take the bond which Mul Chand had executed.

Mul Chand has died since the institution of this appeal and his legal representatives have been brought upon the record. The learned counsel in supporting the decree of the Court below has argued, first, that the suit is barred by limitation, and next, that the plaintiffs are not entitled to recover as the payment of Rs. 40,000 by them was a gratuitous payment which they were under no necessity to make. I may mention here that in the written statement filed by the defendant there was a plea to the effect that he had spent about Rs. 4,000 out of his own pocket in defending Udai Ram's suit, and that he had done this on the express agreement of Rao Umrao Singh and with the knowledge and permission of the present plaintiffs, that he would be freed from liability. No issue as to this was framed in the Court below, and no reference to the plea has been made by the respondents' counsel, so it is unnecessary to allude to it further.

On the question of limitation, I have no hesitation in agreeing with the Court below. The suit is brought within three years of the date when the plaintiffs paid Rs. 40,000 in terms of the compromise, and it was upon making that payment that the plaintiffs became entitled to recover. The suit is within time whether the case be considered to fall under article 61 or article 83 of the second schedule of the Limitation Act.

Coming to the second ground of defence set up on behalf of the respondents, I am of opinion that it cannot be sustained. It is argued that the payment by the sons was gratuitous, as they had a good defence to the suit, and that when the payment was made

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by them, their pious liability as Hindu sons was no longer enforceable. I cannot assent to this argument. At the time when the sons were brought on the record as defendants to Udai Ram's suit, there was a subsisting debt, not tainted by immorality, due from their father, and this debt they were bound by Hindu law to discharge. The suit against the sons cannot be held to have been barred. The second proviso to section 22 of the Limitation Act provides that when a defendant dies and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant. I may mention that with regard to this defence we sent down an issue to the Court below, to ascertain whether the sons of Rao Umrao Singh inherited from their father any property other than the joint ancestral property to which they succeeded by survivorship. The Court below found that they inherited no such property. Objections were taken to this finding, and if it were necessary to dispose of them, I should have little difficulty in coming to the conclusion, that having regard to the circumstances under which the Kuchesar and Muhi-ud-dinpur properties were acquired by Rao Umrao Singh they were not ancestral properties to which the sons succeeded by survivorship. The learned counsel for the appellants in support of his objection refers to what is said by Mayne in paras. 274 and 275 of his Hindu Law and Usage, and this in my judgment fully supports his objections. However, it is unnecessary to decide this point as, under the circumstances stated, the sons were in my opinion bound by Hindu law to pay the debt incurred by their father, a debt in no way tainted by immorality, out of any property which had belonged to their father, to which they succeeded either by survivorship or inheritance.

For the above reasons I am of opinion that the appeal must succeed in so far as it relates to the Rs. 40,000. I would therefore set aside the decision of the lower Court and decree in favour of the plaintiffs for Rs. 40,000, together with Rs. 3,280 interest, up to date of institution of the suit, and thereafter interest to date of realization at the rate of 6 per cent. per annum. This decree not to be against the present respondents personally, but to be realized from such property of Mul Chand as may be in their hands and as

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to a case where a plaintiff has been prosecuting his suit in a wrong Court in consequence of a *bonâ fide* mistake of law—see *Brij Mohan Das* v. *Mannu Bibi* (1). It is true that section 14 applies only to suits and not to appeals. But it has been held by this Court—see *Balwant Singh* v. *Gumani Ram* (2) that the circumstances contemplated in section 14 might, and ordinarily would, constitute a sufficient cause in the sense of section 5, and the reason why section 14 is limited to Courts of original jurisdiction is merely because the earlier section had given a larger and more unfettered power in the same behalf to appellate Courts. In the case of *Kura Mal* v. *Ram Nath* (3) it was held that when a client *bonâ fide* accepts the advice of counsel as to the proper procedure to adopt in the course of litigation, and misled by that advice fails to file an appeal within time, he is entitled to the benefit of section 5 of the Limitation Act. Following these rulings I have no hesitation in ruling that in the exercise of proper discretion the District Judge ought to have admitted the appeal under section 5 of the Limitation Act. I set aside his order and remand the case to him under the provisions of section 562 of the Code of Civil Procedure. I direct him to readmit the appeal under its original number in the register and proceed to dispose of it on the merits. I make no order as to the costs of this appeal.

Appeal decreed and cause remanded.

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June 13.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Dillon.

MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) v. PARBATI AND ANOTHER (DEFENDANTS).*

Muhammadan Law—Shias—Succession—Childless widow—Rights of widow in possession in lieu of dower—Act No. IV of 1882 *(Transfer of Property Act, section* 6 *(d))—Mortgage—Adverse possession.*

Under the Imamia Law a widow, if she has no issue alive at her husband's death, does not inherit any of her husband's immovable property.

A Muhammadan widow in possession of immovable property of her deceased husband in lieu of her dower has only a lien on the property to secure payment of the dower debt: she has no transferable interest in the property.

* First Appeal No. 222 of 1904, from a decree of Babu Madho Das, Subordinate Judge of Saharanpur, dated the 14th of July 1904.

(1) (1897) I. L. R., 19 All., 348. (2) (1883) I. L. R., 5 All., 591.
(3) (1906) I. L. R., 28 All., 414.

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Musammat Babee Baoĥun v. *Sheikh Hamid Hoosein* (1) and *Hadi Ali* v. *Akbar Ali* (2) referred to.

A mortgagee cannot during the continuance of the mortgage by any act of his render his possession adverse to the mortgagor. *Khairajmal* v. *Daim* (3) referred to.

The power to appoint a guardian *ad litem* is inherent in every court of civil jurisdiction. Where therefore a Shia Muhammadan lady had been appointed by a civil court guardian *ad litem* of her infant children, it was held that the appointment must be presumed to be valid and that a sale in execution of the decree obtained in such a suit was binding on the minors.

THIS was a suit for redemption of a usufructuary mortgage of a village called Lohari executed on the 28th of January 1846 by one Mahdi Ali. The plaintiffs were the son and daughter of the only surviving daughter of Mahdi Ali, and two other persons who had purchased from the heirs of Mahdi Ali a moiety of their interest in the mortgaged property. The defendants were the two widows of one Baldeo Sahai, the original mortgage having been made in favour of Sita Ram and Sheo Lal, respectively grandfather and father of Baldeo Sahai, and at the time of the mortgage constituting with him a joint Hindu family.

The defendants contended that as to one moiety of the mortgaged property it had been sold to Baldeo Sahai by Ashraf-ul-nissa, the first wife of Mahdi Ali, who was in possession thereof in lieu of her dower, by a sale-deed dated the 27th of May 1853, whilst as to the other moiety it had been purchased by Sheo Lal at sale by auction in execution of decrees against the heirs of Mahdi Ali on the 20th of March 1854, and from him had passed to Baldeo Sahai. In the alternative the defendants pleaded that, if Ashraf-ul-nissa had, according to the Muhammadan law, no title which she could have conveyed to Baldeo Sahai, the possession of the latter must be regarded as adverse, and had lasted for more than 12 years.

The defendants replied that if Asbraf-ul-nissa had any title at all to convey, it could not possibly extend to more than a $\frac{8}{17}$ share according to the Muhammadan law. As to the moiety alleged to have been purchased at auction by Sheo Lal they contended that the village Lohari was not comprised in the property which was sold by auction on the 20th of March 1854, but if it

(1) (1871) 14 Moo., I. A., 377. (2) (1893) I. L. R., 20 All., 262.
(3) (1904) I. L. R., 32 Calc., 296, at p. 312.

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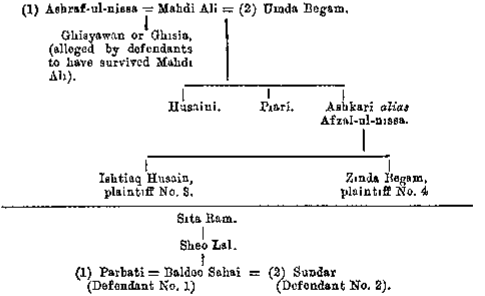
was, only their grandmother's interest was legally saleable and they were at any rate entitled to redeem the remainder.

The Court of first instance (Subordinate Judge of Saharanpur) dismissed the suit in its entirety. The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* and Maulvi *Ghulam Mujtaba*, for the appellants.

Mr. *Karamat Husain*, the Hon'ble Pandit *Sundar Lal*, the Hon'ble Pandit *Madan Mohan Malaviya* and Dr. *Satish Chandra Banerji*, for the respondents.

KNOX, ACTING C.J., and DILLON, J.—This appeal arises out of a suit for redemption of a mortgage, dated the 28th of January 1846. We think it well to begin by explaining the array of parties. Plaintiffs Nos. 1 and 2 are purchasers to the extent of a moiety of the equity of redemption of mauza Lohari from the heirs of the original mortgagor. Plaintiffs 3 and 4 are the heirs of the original mortgagor and are interested in the remaining moiety. The defendants are the heirs of the mortgagees. The following genealogical tree will explain the relationships of the parties:—


(1) Ashraf-ul-nissa = Mahdi Ali = (2) Umda Begam.
Ghiayawan or Ghisia, (alleged by defendants to have survived Mahdi Ali).
Husaini.
Piari.
Ashkari alias Afzal-ul-nissa.
Ishtiaq Husain, plaintiff No. 3.
Zinda Begam, plaintiff No. 4
Sita Ram.
Sheo Lal.
(1) Parbati = Baldeo Sahai = (2) Sundar
(Defendant No. 1)
(Defendant No. 2).

The plaintiffs allege that Mahdi Ali was the owner of mauza Lohari, $\frac{3}{4}$rds of which was his ancestral property, and the remaining $\frac{1}{4}$rd he had inherited from Musammat Hingia. He mortgaged $\frac{1}{4}$rd to Sita Ram and Sheo Lal, who, together with Baldeo Sahai, the son of Sheo Lal, constituted a joint Hindu family at the time of the mortgage.

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The mortgage, which was a usufructuary one for a sum of Rs. 4,000, was for a term of ten years. On the death of Mahdi Ali, who was a Shia Muhammadan, his wife, Ashraf-ul-nissa, being childless, did not inherit any portion of her husband's estate.

The whole property therefore devolved upon Umda Begam, a second wife, and her three daughters, and after the death without issue of Husaini and Piari, two of the said daughters, the property came to Ashkari, the third daughter.

Plaintiffs 3 and 4, who are the son and daughter, respectively, of the said Ashkari, inherited the estate from their mother. The plaintiffs 3 and 4, having thus become entitled to the equity of redemption in the whole property sold a moiety of it to plaintiffs 1 and 2. The plaintiffs claim redemption of the whole of the mortgaged property. Mesne profits are also claimed on the ground that the mortgage was effected before the usury laws were repealed, and mortgagees would, therefore, be only entitled to charge interest at the rate of 12 per cent. per annum on the mortgage money. The case for the defence is that Ashraf-ul-nissa had a daughter by Mahdi Ali who survived her father, and so Ashraf-ul-nissa was one of her husband's heirs; that Mahdi Ali died in debt in 1852, and that Ashraf-ul-nissa, who was in possession of 10 biswas of Lohari in lieu of dower, sold her share by a sale-deed, dated the 27th of May 1853, to Baldeo Sahai, the husband of the defendants, to pay off the said debt, and that as to the remaining 10 biswas of the village, they were sold by auction on the 20th of March 1854, in execution of decrees passed against the heirs of Mahdi Ali, and were purchased by Sheo Lal, one of the mortgagees. From him they passed to Baldeo Sahai, his son, the husband of defendants, who inherited them after his father's death.

The defendants contend that if Ashraf-ul-nissa had no daughter who survived her father, and therefore had no title to convey to Baldeo Sahai, she and Baldeo Sahai must be regarded as strangers, and as Baldeo Sahai had been in possession since the date of sale, or at all events since 1863, when we first find his name entered in the revenue papers, his possession must be regarded as adverse to the heirs of the mortgagors, and, as the suit was brought in 1904, it is barred by the 12 years' rule of limitation.

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It is also pleaded that Baldeo Sahai was not joint with his father, Sheo Lal, at the time he purchased the 10 biswas from Ashraf-ul-nissa, and that having, therefore, lost his mortgagee's rights therein, his possession after the sale must be regarded as adverse to the mortgagors.

On these grounds the defendants contend that the whole of the equity of redemption became vested in the mortgagees, and that there was, therefore, nothing left to redeem. The plaintiffs in reply state that if Ashraf-ul-nissa had any title to convey, she could at the outside only convey her interest as an heir of her husband. Therefore, even on the assumption that she had a daughter who survived Mahdi Ali, she was not entitled to sell what she professed to sell, but only $\frac{1}{16}$, which was her share, and $\frac{3}{16}$, her daughter's, which she inherited, their joint shares being $\frac{4}{16}$. As to the 10 biswas sold by auction, the plaintiffs' position is that the village Lohari was not comprised in the property which was sold by auction on the 20th of March 1854, but, assuming that it was, only the share of Umda Begam was sold, which would be $\frac{1}{16}$, and that therefore the plaintiffs are entitled to the redemption of all but $\frac{1}{32}$. These were in substance the pleadings in the Court below, and it was upon these lines that the case was argued at the hearing of the appeal before us.

It will be seen that upon these pleadings the principal points for determination in this appeal are :—

(1) Had Ashraf-ul-nissa a daughter living when her husband Mahdi Ali died ?

(2) If not, what is the effect of the transfer of the 27th of May 1853, by her to Baldeo Sahai ?

(3) As to the remaining 10 biswas, were they actually sold and purchased by Sheo Lal or not ?

As to point (1) the onus is on the defendants.

[After discussing the evidence the judgment proceeded.]

Be that as it may, we have, as we have shown above, satisfied ourselves that the evidence will not support the finding that Mahdi Ali had a daughter by Ashraf-ul-nissa who survived him. Upon the admission made at the hearing, a widow under Imamia Law, if she has no issue alive at her husband's death, does not inherit any immovable property from her husband. We find that

Syed Ameer Ali in his Muhammadan Law (2nd edition), Vol. II, page 118, lays down as follows:—"Para. 78—The husband takes a share in all kinds of property left by his deceased wife, and so does the widow when she has a child born of her womb or child's child. But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects, trees, buildings, etc.: she takes no interest in the landed property. When there are several widows, they take the fourth of the personal estate equally. But when the widow has children, she takes $\frac{1}{8}$th of both personal and real property. If the children, however, be not of her womb, she is not entitled to $\frac{1}{8}$th of the real estate."

But it has been contended for the respondents, that it is immaterial whether Ashraf-ul-nissa had a daughter or not; that as she was in possession of half of Lohari in lieu of her dower, she could in that right convey a good title by the sale-deed of the 27th May 1853. This is the position which was definitely taken up by the counsel for the respondents at the hearing before us, and this is the interpretation which he asks us to put on para. 7 of the written statement—(*Vide* paper book, page 10). In support of his argument he again referred us to the sale-deed of 27th May 1853, to be found at page 31R. In the sale-deed Syed Inayat Husain, Mukhtiar of Musammat Ashraf-ul-nissa, set forth as follows:—

"My client," *i. e.* Ashraf-ul-nissa, "remained the heir of half the estate of the deceased in lieu of the dower debt," and goes on to say that as her husband died heavily involved and she had to satisfy the decrees against his estate, she makes an absolute sale of the 10 biswas share, including the mortgaged property as well as property which was not mortgaged, owned by her and situate in Lohari, to Baldeo Sahai, son of Sheo Lal, for Rs. 75,000. Assuming that Musammat Ashraf-ul-nissa had a claim against her husband's estate for unpaid dower and that in this right she considered herself entitled to deal with 10 biswas of mauza Lohari and that she transferred whatever right she had under the sale-deed to Baldeo Sahai, the question is—what is the legal effect of this transfer?

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The appellants at once answer this by referring us to *Mussumat Bebee Bachun* v. *Sheikh Hamid Hossein* (1), in which case a Muhammadan widow, whose husband died without issue, had been put in possession of her husband's estate by the Collector's Court as a co-heir and for her deferred dower, and the question arose as to her position.

Their Lordships of the Privy Council at page 384 lay down the law as follows:—"But the appellant having obtained actual and lawful possession of the estates under a claim to hold them as heir, and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and the respondents cannot recover the possession of their shares unless that satisfaction has taken place." "It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, though no doubt the right is so stated in the judgment of the High Court in the case of *Ahmed Hossein* v. *Khodeja* (2). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property subject to the claims for the profits received."

It will be seen that this is a much stronger case than the one before us. The lady was in actual and lawful possession (a status to which Musammat Ashraf-ul-nissa, it is admitted, never attained, possession having remained all along with the mortgagees), and yet the utmost right assigned to her is that of a creditor to hold certain property until her debt is satisfied, with the liability to account to those entitled to the property. Such a right could never be transferable. It is nothing more than an interest in property restricted in its enjoyment to the owner personally, and the transfer of any such right is prohibited by section 6, clause (*d*) of the Transfer of Property Act, No. IV of 1882.

Furthermore, we have held in this Court that such rights are neither inheritable nor transferable—see the decision in *Hadi Ali* v. *Akbar Ali* (3).

(1) (1871) 14 Moo. I. A., 377. (2) (1868) 10 W. R., 369.
(3) (1898) I. L. R., 20 All., 262.

The next argument that was addressed to us by the respondent was directed to showing that Baldeo Sahai had acquired a title by adverse possession.

[The discussion of the evidence on this point is omitted.]

In short we find that the separation between father and son was one merely of convenience, and that the family remained to all intents and purposes a joint family.

This finding at which we have arrived disposes of the whole argument as to Baldeo Sahai's having acquired a title by adverse possession. When Baldeo Sahai's name was entered in 1863 as owner, he came to the property as no independent stranger, but as a mortgagee.

This brings us to the question:—Can a mortgagee by any act of his own render his possession adverse to the mortgagor during the continuance of the mortgage? And our answer is in the negative. The ruling in *Khiarajmal* v. *Daim* (1) seems to us conclusive on the point. The following are the remarks which support this view:—

"Their Lordships are satisfied that possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar of defence to a suit for redemption, if the parties are otherwise entitled to redeem."

We have now only to consider the third principal point in this case, *viz.*, as to the remaining 10 biswas—were they actually sold and purchased by Sheo Lal or not? The case for the appellant is that they were not sold, but only the rights of Musammat Umda therein were sold. Our answer to this question will depend upon the view we take of the documentary evidence at pages 20, 21 and 22-A. On a perusal of this evidence we agree with the lower Court that it proves that the remaining 10 biswas of Lohari were actually sold and purchased by Sheo Lal at the auction sale of the 30th of March 1854, and that he has been in possession ever since. It is argued that such sale would be

(1) (1904) I. L. R., 32 Calc., 226, at p. 312.

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ineffectual as against the daughters of Musammat Umda Begam, because the decrees which had been obtained, and which are to be found at page 20-A, were invalid as against them, they not having been properly represented in those suits; that an Imamia mother cannot, under any circumstances, be the lawful guardian of her minor children, and a passage in Baillie's Muhammadan Law, Imamia, page 232, was relied on. It was also urged that it is doubtful whether at the time when the decrees were obtained a Civil Court in these Provinces had the power of appointing a guardian *ad litem*, but that in any case, even if it is assumed that the minors were properly represented in those suits by their mother that representation cannot be held to extend to the sale proceedings. We think that we ought to presume that Musammat Umda was appointed by the Court to act in those suits as guardian of her minor children, and we also think that the power to appoint a guardian *ad litem* is inherent in every court of civil jurisdiction. The sale proceedings were a continuation of the suit which had been brought, and the decrees which had been obtained, against Musammat Umda in her own right and as guardian of her infant daughters. The property actually sold, namely, the 10 biswas, was not her share alone, but was the joint shares of the mother and the minors, in other words, of the judgment-debtors; Sheo Lal paid full consideration, and his good faith has not in any way been impugned. He has been in possession for over fifty years. We decide the third point in favour of the respondents. On the result the plaintiffs' appeal will be allowed so far as the 10 biswas purchased by Baldeo Sahai are concerned; but as to the remaining 10 biswas their appeal will be dismissed. Costs will be in proportion to the success and failure of this appeal. We accordingly set aside the decree of the Court below so far as it dismissed the plaintiffs' claim to be allowed to redeem the 10 biswas of Lohari which were sold to Baldeo Sahai and remand the case to that Court with directions to readmit the suit under its original number in the register and dispose of it on the merits in accordance with what we have above set out.

Appeal decreed and cause remanded.

Before Mr. Justice Griffin.

1907
June 13

CHHANNU LAL (DEFENDANT) *v.* ASHARFI LAL AND ANOTHER (PLAINTIFF).*

Act No. XVIII of 1878 *(Legal Practitioners' Act), section* 28—*Pleader—Agreement to allow legal fees to be set off against money advanced to a pleader by a client.*

A client advanced certain money to a pleader who subsequently appeared for the lender in various cases. On suit by the lender to recover his loan the pleader set up an agreement entitling him to set off against the money borrowed his fees for professional services. *Held* that the pleader was entitled to a set-off in the shape of reasonable remuneration for services actually rendered although there was no such agreement as required by the Legal Practitioners' Act, section 28. *Raghunath Saran Singh* v. *Sri Ram* (1) and *Razi-ud-din* v. *Karim Bakhsh* (2) referred to.

IN this case one Jawahir Lal, who was a pleader commencing practice at Agra, borrowed a sum of Rs. 1,200 from Chhannu Lal and executed two promissory notes for the amount. Chhannu Lal instituted a suit to recover the amount of the promissory notes, and at or about the same time Jawahir Lal and his brother Asharfi Lal, who was joint with him, instituted a suit against Chhannu Lal for a declaration that the amount due on the promissory notes had been satisfied out of the remuneration due to them on account of their professional services to Chhannu Lal. The Court of first instance (Subordinate Judge of Agra) disposed of both suits at one and the same trial. It decreed Chhannu Lal's suit in part, deducting from the amount of his claim the remuneration found to be actually due to Jawahir Lal and Asharfi Lal for professional services in cases in which they were engaged to appear on behalf of Chhannu Lal. Both sides appealed to the District Judge, who, however, dismissed both appeals and confirmed the decree of the first Court. The present appeal was brought by Chhannu Lal in the suit of Jawahir Lal and Asharfi Lal.

Pandit *M. L. Sandal*, for the appellant.

Pandit *Kedar Nath*, for the respondents.

GRIFFIN, J.—One Jawahir Lal, the respondent, who was a pleader commencing practice at Agra, borrowed a sum of Rs. 1,200

* Second Appeal No. 850 of 1906, from a decree of H. W. Lyle, Esq., District Judge of Agra, dated the 12th of June 1906, confirming a decree of Munshi Shankar Lal, Subordinate Judge of Agra, dated the 19th of May 1905.

(1) (1906) I. L. R., 28 All., 764. (2) (1890) I. L. R., 12 All., 169.

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from Chhannu Lal, the present appellant, and executed two promissory notes for that amount. Chhannu Lal instituted a suit to recover the amount of the promissory notes, and at or about the same time Jawahir Lal, with his brother Asharfi Lal, who is found to be joint with Jawahir Lal, instituted a suit against Chhannu Lal for a declaration that the amount due had been paid out of the remuneration payable to them on account of their professional services to Chhannu Lal. Both suits were disposed of in one and the same trial by the Court of first instance, which decreed Chhannu Lal's suit in part, deducting from the amount of his claim the remuneration found to be actually due to Jawahir Lal and his brother Asharfi Lal for professional services in cases in which they were engaged to appear on behalf of Chhannu Lal. Both parties appealed to the District Judge, who has dismissed both appeals and confirmed the decree of the Court of first instance. In second appeal it is contended on behalf of the appellant, Chhannu Lal, that the respondents, Jawahir Lal and Asharfi Lal, rely upon a special agreement; that this special agreement, not being in writing, was in contravention of the provisions of section 28 of the Legal Practitioners' Act, and that therefore their suit, which is based upon that special agreement, is not maintainable. Further objection is taken that the suit brought by Asharfi Lal and Jawahir Lal is bad for misjoinder of parties. As to this objection, it does not appear that Chhannu Lal was in any way prejudiced by Asharfi Lal appearing as a plaintiff in the suit in which Asharfi Lal was undoubtedly interested as a member of a Joint Hindu family. On the question as to the interpretation of section 28 of the Legal Practitioners' Act, I am referred by the learned vakils for the parties to the ruling in *Raghunath Saran Singh* v. *Sri Ram* (1), in which it was held :—"The Legislature intended by this section that all special agreements between a pleader and his client should be in writing, signed and filed according to the provisions of the section. It intended at the same time to leave the pleader his full right to recover from his client his reasonable and proper fees for work actually done for the client and also all money duly and properly disbursed on his behalf. If a pleader relies

(1) (1890) I. L. R., 12 All., 189.

on an express or special agreement, he must prove one made in accordance with the provisions of the section." Further on in the same judgment the ruling reported in *Razi-ud-din* v. *Karim Bakhsh* (1) is quoted with approval. In the latter ruling Mr. Justice Straight holds, in regard to sections 28, 29 and 30 of the Legal Practitioners' Act, that "what these sections, in my opinion, did was to make provisions for agreements made between pleaders and their clients which relate to the payment of remuneration in excess of and apart from the amount allowed in the taxation." This being the interpretation put upon the provisions of section 28 of the Legal Practitioners' Act by a Division Bench in this Court in a ruling which has been approved by a Full Bench, I am bound to follow it. The alleged agreement is set out in paragraphs 1 and 2 of the plaint filed by Asharfi Lal and Jawahir Lal, and according to this agreement the sums due to them as their fees in cases in which *vakalatnamas* were filed, were to be set off against the loan of Jawahir Lal. This appears to have been an agreement relating to the manner in which payment for future services was to be made, and possibly, were the matter *res integra*, I would be inclined to hold that the agreement is not a valid one, not having been made in writing and signed and filed as provided for by section 28. I am, however, as said above, bound to follow the interpretation put upon the section in the ruling referred to above. It has been found as a fact that the defendants did render professional services to Chhannu Lal, and the amount due to them on account of these services has been proved by the certificates filed in each case. The fact of their engagement is also proved by the production of the *vakalatnama*, which provided that they were to be remunerated at the legal fees. In my opinion the grounds taken by the appellant must fail, and I must therefore dismiss this appeal, the appellant to pay respondents' costs.

Appeal dismissed.

(1) (1890) I. L. R., 12, All., 169.

1907
July 4.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Dillon.

BUDH SINGH AND OTHERS (DEFENDANTS) *v.* PARBATI (PLAINTIFF).*

Act No. V of 1882 *(Indian Easements Act), section* 60—*Land-holder and tenant — Occupation of building site in abadi—Erection of permanent building—Suit for ejectment.*

The defendants were found on the evidence to be tenants at will of the plaintiff of land in the abadi, the land having been allotted to their ancestors on condition of their rendering service as patwaris. The defendants had ceased to perform the duties of patwaris, but still occupied the land, and had built houses thereon of a permanent character. *Held* on suit by the zamindar to eject the defendants, who had denied the zamindar's title, that the principles laid down in *Beni Ram* v. *Kundan Lal* (1) applied, and that there was no such conduct on the part of the zamindar as would justify the inference that she had contracted that the right of tenancy under which the defendants originally obtained possession of the land should be changed into a permanent right of occupation; neither could the defendants pray in aid section 60 of the Indian Easements Act, 1882. *Held* also that the acquisition pending the suit by one of the defendants of a share in the village in which the land in suit was situate did not give the defendants any title to retain possession of the site in the abadi from which the plaintiff was suing to eject them.

THIS was a suit for recovery of possession of certain plots of land by demolition of a house and removal of the materials. The plaintiff came into Court alleging that she was, in consequence of a partition, proprietor of a separate share in a village called Lohari, that the defendants were her tenants; that the ancestor of the defendants had been allowed to settle in the village and to occupy plot No. 3 in the khasra of the settlement of 1862 as a dwelling house, and to hold possession of plot No. 99 in the same khasra for the purposes of a shop and the tying up of their cattle as tenants; that about 10 or 11 years ago the plaintiff appointed defendant No. 1 as his karinda and put him in charge of Lohari circle, and that in his capacity of karinda the defendant had full control over the plaintiff's share in the inhabited part of the village as well as in the waste lands; that about 8 or 9 years ago the defendants encroached on plots 71 and 72, which are at the back of plot No. 99, by extending their dwelling-house in that direction. The plaintiff did not object to their doing this so long as defendant No. 1 was her karinda, but he ceased to be so, and

* First Appeal No. 127 of 1905, from a decree of Babu Madho Das, Subordinate Judge of Saharanpur, dated the 14th of September 1904.

(1) (1899) I. L. R., 21 All., 496.

the defendants denied her title to the land in question. Hence the present suit.

The defence was that the defendants and their ancestors had been in possession for over fifty years, and were not ordinary tenants at will, that the ancestors of the defendants were patwaris in this village, and with the consent of the former owners and zamindars, who were Muhammadans, and from whom the plaintiff was a transferee, they permanently took up their residence in the village; that all the plots in dispute have been in their possession as patwaris; that the plaintiff and her predecessors in title admitted the permanent nature of their possession; that the defendants and their predecessor, relying on this admission and with the knowledge and acquiescence of the plaintiff and her predecessors, built houses at a cost of Rs. 10,000, and that they were, therefore, not liable to be ejected.

The first Court (Subordinate Judge of Saharanpur) gave the plaintiffs a decree for ejectment of the defendants. The defendants appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru*, Maulvi *Ghulam Mujtaba* and Pandit *Mohan Lal Nehru*, for the appellants.

Mr. *Karamat Husain* and the Hon'ble Pandit *Sundar Lal*, for the respondents.

KNOX, ACTING C.J., and DILLON, J.—The suit out of which this appeal has arisen was brought by the plaintiff respondent for possession of certain plots of land by demolition of a house and removal of the materials. The plaintiff came into Court alleging that she is, in consequence of a partition, proprietor of a separate share in Lohari, and that the defendants are her tenants; that the ancestor of the defendants had been allowed to settle in the village and to occupy plot No. 3 in the khasra in the settlement of 1862 as a dwelling house and to hold possession of plot No. 99 in the same khasra for the purposes of a shop and the tying up of their cattle as tenants; that about 10 or 11 years ago the plaintiff appointed defendant No. 1 as her karinda and put him in charge of Lohari circle, and that in his capacity of karinda the defendant had full control over plaintiff's share in the inhabited part of the village as well as in the waste lands; that about 8 or 9 years ago

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the defendants encroached on plots Nos. 71 and 72, which are at the back of plot No. 99, by extending their dwelling house in that direction. The plaintiff did not object to their doing this, while defendant No. 1 was her karinda, but now that he is no longer so and also because the defendants had denied her title to the land in question, she brings this suit for ejectment and possession. The defence was that the defendants and their ancestors have been living in this village for over fifty years; that they are not and never have been ordinary tenants at will; that the ancestors of the defendants were patwaris in this village, and with the consent of the former owners and zamindars, who were Muhammadans, and from whom the plaintiff is a transferee, they permanently took up their residence in the village; that all the plots in dispute have been in their possession in their capacity of patwaris; that the plaintiff and her predecessors admitted the permanent nature of their possession; that the defendants and their predecessor relying on this admission and with the knowledge and acquiescence of the plaintiff and her predecessors built houses at the cost of Rs. 10,000, and that they are not, therefore, liable to be ejected. It is of great importance to bear in mind the position that was taken up in the Court below, because at the hearing of the appeal before us it was argued by the learned advocate for the appellant that the defendants were licensees, and that it having been found by the Court below that the defendants had erected buildings at a cost of four thousand rupees, plaintiff could not, under the provisions of section 60 of the Easements Act, sue for ejectment. It was further argued that the defendant, Budh Singh, was now by our judgment in First Appeal No. 222 of 1904 (*Supra* p. 640) himself a co-sharer in the village, and that as such he was as much entitled to build on any part of the common land as plaintiff herself. It was further urged that even if we held that defendants were tenants, plaintiff had no cause of action because the defendants had not denied her title as owner. In reply it was urged for the plaintiff respondent that the position that the defendants were only licensees had been taken for the first time at the hearing of this appeal, and that it was inconsistent with the case that had been set up by the defendants in the Court below, where it had been alleged by them that they had a

permanent tenancy or grant in perpetuity; that even if defendants had originally got possession of the land as licensees from the plaintiff's predecessors, the plaintiff as transferee from them was not, under section 59 of the Easements Act, bound by such license, and finally that the evidence relied on by the plaintiff as constituting a denial of her title, did expressly and specifically challenge her rights as owner of the land in dispute. It will be seen from what we have stated above that the principal points for determination in this appeal are—(1) What was the status of the defendants' ancestor when he first settled in the village? (2) If the status be only that of an ordinary tenant, does the fact that defendant No. 1 recently (after the filing of the suit) became a co-sharer entitle him to resist the plaintiff's claim for possession? (3) Has there been such a denial of the plaintiff's title as to give her a cause of action?

To deal with these pleas in the above order. The first plea is really the important one, and the whole case turns on our finding on this plea. The plaintiff has throughout alleged, and still alleges, that the defendants are mere tenants at will. The account which she gives of their entry into the village is a probable one and is to a great extent confirmed by what the defendants say. They were invited into the village as patwaris and given a spot on which to live, on condition of their performing this duty, *i.e.* the duty of the patwari of the village. The present patwari, Bakhtawar Singh, who has been patwari for the last sixteen or seventeen years, would be manifestly in a position to know something about their status: to acquire such knowledge is part of his work as patwari and lies within the range of his ordinary duties. The defendants in cross-examination put questions to him and elicited from him that he had heard that the grandfather of Budh Singh was the patwari of the village. The defendant, Budh Singh, makes some very important statements in his evidence which will be found on page 8 of the appellant's book. When asked about his origin he replies:—"My ancestors have been living in this village for four generations. They have been living there not only from the time of Baldeo Sahai but also from the time of the Saiyids. I am a tenant of Musammat Parbati. I am a tenant of hers as regards

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the houses situate on her land, and a tenant of Sundar as regards the houses situate on her land. I do not render any service as a tenant of Parbati. I am a karinda of Musammat Parbati. I was in charge of the management of the mauza Lohari for one year."

The learned advocate for the appellants tried to explain away this evidence by arguing that the word "ryot," which occurs therein, and which has been translated "tenant" does not necessarily mean a tenant as understood in the Land Revenue and Tenancy Acts. The obvious answer to this argument is that the word as ordinarily used and ordinarily understood in these Provinces does mean an agricultural tenant: it is in our experience the word invariably used to connote the relation of tenant to a land-holder. No other word was suggested as being the word generally used for this purpose. It might be urged that there is nothing to show that Budh Singh's ancestors ever paid money rent to the zamindars, but the payment of money rent is not the only sign of a tenant. Tenants who render service to the land-holder are tenants through the service they thus render (compare section 4, clause 3, of Act No. II of 1901). Further, there is the statement made by the pleader for the defendants to be found at page 11 of the respondent's book in which he stated "that at the time of construction of the houses sought to be demolished, the defendants were not the zamindars, but that they were his (zamindar's) permanent ryots; that till the time they (defendants) purchased the zamindari they remained the ryots of the zamindar for the time being; that they were the ryots of the plaintiffs also, and that their status as a ryot was such as has been mentioned in the written statement." Considering all this evidence and all that has been urged on behalf of the defendants, we find that the defendants are tenants at will of the land in dispute. We find that the land was allotted to them on the condition of their rendering service as patwaris, and that though they and their predecessors in interest have ceased to occupy that office, they still are tenants at will. They have set up the position that they are permanent tenants, and, as such, not liable to be disturbed. It is so far as our experience goes, and the contrary has not been shown, a very unusual thing to find a person who has no other

holding in the village than a plot in the abadi a permanent tenant. Such a holding implies a grant of some kind, and it was for the appellants to have established such a grant. This they have failed to do. At the time when the suit was brought, upon our finding recorded above, the plaintiffs were, unless the defendants could show acquiescence or some similar plea, entitled to call upon the defendants to quit their holding on the ground that the purposes for which the holding was required no longer existed.

The suit out of which this appeal arises was instituted on the 7th of March 1903. On the 3rd of June Budh Singh, the principal defendant, purchased a certain specified share in Lohari.

Was the plaintiff's position in any way altered by this belated purchase on the part of the defendants? We think not. We find that she was still entitled to interfere and obtain restoration of the land to its former condition. See the ruling in *Doulut Ram* v. *Tara* (1).

But it is urged by the learned advocate for the appellants that the plaintiff or her predecessors in interest must by their conduct be held to have acquiesced in the erection of these buildings and are, therefore, equitably estopped from enforcing their removal. It has been very clearly laid down by their Lordships of the Privy Council in *Beni Ram* v. *Kundan Lal* (2) that a lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the terms of whose lease have expired, merely by reason of that tenant's having erected permanent structures on the land leased, such building having been within the knowledge of the lessor and there not having been any interference on his part to prevent it. As their Lordships point out:—"In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation." It is true that

(1) N.-W. P., H. C. Rep., 1866, 12. (2) (1899) I. L. R., 21 All., 496.

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this was a case in which a tenant held under a lease which had expired by the time the suit was brought, but the principles laid down appear to us to apply with equal force to the case before us. There is no doubt that the learned advocate for the appellants has felt all these difficulties which surround his position, and that they have led him to adopt the argument that the appellants were not tenants, but licensees holding under a license from the predecessors in interest of the respondent. This view of the case was never raised in the Court below. The deposition of Budh Singh himself to which we have already referred is opposed to such a view, and it is a view which up to the present has not found favour in this Court (Cf. *Punna* v *Nazir Husain*, Weekly Notes, 1902, p. 60).

The view which we have taken, *i.e.* that the plaintiff is land-holder and the defendants are tenants at will whom she seeks to eject on the ground that they are no longer required to, and do not, perform the services for which they obtained their holding, renders it almost unnecessary to consider the third plea, but after considering the evidence we do find that on more than one instance the defendants have challenged plaintiff's title, thus giving her a cause of action and a right to call upon the Civil Courts to eject the defendants.

We accordingly dismiss the appeal, but under the special circumstances direct that each party bear his own costs throughout. This order of ours is without prejudice to the rights, whatever they may be, acquired by the appellants under their purchase in June 1903, should they hereafter proceed to partition.

Appeal dismissed.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

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July 5.

SALIG RAM (DEFENDANT) *v* BRIJ BILAS (PLAINTIFF).*

Civil Procedure Code, section 562—Remand—Appeal from order of remand after decision of the suit in accordance therewith.

Held that no appeal will lie from an order of remand passed under section 562 of the Code of Civil Procedure if such appeal is filed after the suit has in compliance with the order of remand been decided and no appeal is preferred from the decree in the suit. *Madhu Sudan Sen v Kamini Kanta Sen* (1) followed *Rameswar Singh v Shaodin Singh* (2) distinguished.

IN this case the plaintiff brought a suit for pre-emption, which was dismissed on the 8th of June 1906 by the Court of first instance. The plaintiff appealed, and on the 10th of September 1906 the suit was remanded. On the 9th of November 1906 the first Court on remand decreed the suit. The defendant did not appeal against the decree in the suit, but on the 1st of December 1906, that is to say, after the order of remand had been complied with and the suit reheard, appealed against the order of remand only. On this appeal a preliminary objection was taken to the effect that no appeal would lie under the circumstances against the order of remand.

Munshi *Gulzari Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Lala *Kedar Nath*, for the respondent.

KNOX, ACTING C. J., and RICHARDS, J.—This is an appeal from an order of remand. The suit was a suit for pre-emption and on the 8th of June 1906 the Court of first instance dismissed the suit. The plaintiff appealed, and on the 10th of September 1906 the suit was remanded. On the 9th of November 1906 the Court of first instance on remand decreed the suit. The present appeal is not taken against the decree that was made on the 9th of November 1906. It is an appeal filed against the order of remand, and the appeal was not filed until after the decree of the 9th November 1906 was actually made. The appeal was filed on the 1st December 1906. The appellant appeared on the hearing of the suit on remand. A preliminary objection is now raised by Mr. *Kedar Nath* on behalf of the respondent that the present appeal cannot be sustained under the circumstances mentioned. He has cited the

* First Appeal No 124 of 1906, from an order of C D. Steel, Esq., District Judge of Shahjahanpur, dated the 10th of September 1906.

(1) (1906) 9 C. W. N., 895. (2) (1889) I. L. R., 12 All., 510.

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case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1). In this case under circumstances which cannot be distinguished from the case before us, a similar preliminary objection was taken and allowed by the Court. Mr. *Gulzari Lal* on the other side cites the Full Bench Ruling of *Rameswar Singh* v. *Shodhi Singh* (2). In that case there had been an order of remand; the suit had been reheard by the Court of first instance who had made a decree. There was a second appeal to the lower appellate Court, which confirmed the decree of the Court of first instance, and then there was an appeal against the second decree of the lower appellate Court. The Court there allowed the appellants to question the order of remand, but the appeal in that case was an appeal from a final decree and not an appeal from an order of remand. The case, therefore, is quite different from the present and does not apply. If we are now to hear this appeal, the decree that was made on the 9th November 1906 would still remain. Having allowed that decree to be made, the proper course was to appeal against that decree and at the hearing of the appeal to take such exception to the order of remand as the law permits, as was done in the Full Bench case to which we just now referred. We allow the preliminary objection, and in consequence we dismiss the appeal with costs.

Appeal dismissed.

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July 6.

Before Mr. Justice Dillon and Mr. Justice Griffin.

ALI SHER KHAN (DEFENDANT) v. AHMAD ULLAH KHAN AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 566—Remand—Return to remand to be made by the Court originally seised of the case—Jurisdiction.

Held that when issues are remitted for trial under section 566 of the Code of Civil Procedure such issues are triable only by the Court which was originally seised of the case. The principle of *Sahi* v. *Ganeshi* (1) followed.

THIS was a suit for profits brought by the plaintiffs respondents, who were co-sharers, against the defendant appellant, who was the lambardar, for the years 1309 and 1310 Fasli. They

* Second Appeal No 984 of 1905 from a decree of G. C Radhwar, Esq., Additional District Judge of Saharanpur, dated the 21st of August 1905, modifying a decree of Munshi Makund Ali Khan, Assistant Collector, 1st Class, of Muzaffarnagar, dated the 18th of July 1904.

(1) (1905) 9 C. W. N. 895. (2) (1889) I. L. R., 12 All., 510.
(1) (1891) I. L. R., 14 All., 23.

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claimed Rs. 260 on account of such profits. The suit was tried by the Assistant Collector of the Kairana sub-division in the district of Muzaffarnagar, who gave the plaintiffs a decree for Rs. 135 They appealed to the District Judge, and ultimately the appeal came on for hearing before the Additional Judge of Saharanpur By an order, dated the 24th of January 1905, under section 566 of the Code of Civil Procedure, he remanded the case to the Court which had tried it for findings upon certain issues and for the taking of additional evidence. The case then apparently found its way (how, it did not appear, but presumably under an order passed by the Collector) into the Court of the Assistant Collector of the "headquarters pargana." At the very earliest opportunity the defendant appellant objected to the jurisdiction of the Court, but his objection was overruled. The fresh evidence directed to be taken was so taken, and, together with the findings thereon, was returned to the Court of the District Judge of Saharanpur. Those findings were entirely in favour of the defendant appellant, who did not renew his objection in the lower appellate Court as to the jurisdiction of the Assistant Collector. The lower appellate Court after due consideration of the evidence and the findings gave the plaintiffs a decree for a somewhat larger amount than had been given to them by the Assistant Collector in the first instance and modified the decree accordingly. The defendant appealed to the High Court, and the only plea that was urged was that the Court of the Assistant Collector of the "headquarters pargana," Muzaffarnagar, had no jurisdiction to try the issues which had been remitted by the lower appellate Court, and that therefore all subsequent proceedings were null and void.

Mr. *Karamat Husain*, for the appellant.

Mr. *Abdul Majid*, for the respondents.

DILLON and GRIFFIN, JJ.—This appeal arises out of a suit for profits which was brought by the plaintiffs respondents, who are co-sharers, against the defendant appellant, who is the lambardar, for the years 1309 and 1310 F. They claimed Rs. 260 on account of such profits. The suit was tried by the Assistant Collector of the Kairana sub-division in the district of Muzaffarnagar, who gave the plaintiffs a decree for Rs. 135. They

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appealed to the District Judge, and ultimately the appeal came on for hearing before the Additional Judge of Saharanpur. By an order, dated the 24th of January 1905, under section 566 of the Code of Civil Procedure, he remanded the case to the Court which had tried it for findings upon certain issues and for the taking of additional evidence. The case then apparently found its way (how, it does not appear) to the Court of the Assistant Collector of the "headquarters pargana." We may assume that it was by an order passed by the Collector. At the very earliest opportunity the defendant appellant objected to the jurisdiction of the Court, but his objection was overruled. The fresh evidence directed to be taken was so taken and, together with the findings thereon, was returned to the Court of the District Judge of Saharanpur. Those findings were entirely in favour of the defendant appellant, who did not renew his objection in the lower appellate Court as to the jurisdiction of the Assistant Collector. The lower appellate Court after due consideration of the evidence and the findings gave the plaintiffs a decree for a somewhat larger amount than had been given to them by the Assistant Collector in the first instance and modified the decree accordingly. The defendant has now appealed to this Court, and the only plea that has been urged is that the Court of the Assistant Collector of the "headquarters pargana," Muzaffarnagar, had no jurisdiction to try the issues which had been remitted by the lower appellate Court, and that therefore all subsequent proceedings are null and void.

The learned counsel who appeared on behalf of the appellant called our attention to the ruling in the case of *Sabri* v. *Ganeshi* (1). We have carefully considered that case, and though it is not exactly on all fours with the case before us, we think that its principle applies. Furthermore, it seems to us upon consideration of section 566 of the Code of Civil Procedure, that it clearly lays down that the issues remitted for trial under that section are triable only by the Court which was originally seised of the case. It was argued by the learned counsel who appeared on behalf of the plaintiffs respondents that the defective procedure in this case amounted to a mere irregularity, and as such was covered by

(1) (1891) I. L. R., 14 All., 23.

the provisions of section 578 of the Code of Civil Procedure. The appellant's objection is, no doubt, a very technical one, but we are of opinion that the defective procedure amounted to something more than a mere irregularity. We think that the Court which carried out the remand order had no jurisdiction to try the issues remitted by the lower appellate Court, and that therefore section 578 does not apply to this case. In this view we allow the appeal, set aside the order of the Court below and we direct that Court to restore the appeal to its original number in the register of appeals, and to take it up at the stage at which it had arrived when the order of remand was passed on the 24th of January 1905 and to deal with it according to law. The costs of this appeal will be the costs in the cause.

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Before Sir George Knox, Acting Chief Justice, and Mr Justice Dillon.

1907 *July* 9.

SHEO PRASAD AND ANOTHER (PLAINTIFFS) v AYA RAM AND OTHERS (DEFENDANTS.)*

Hindu law—Religious endowment—Right to appoint manager

According to Hindu law, when a religious endowment has been founded, the right to appoint a manager or superintendent remains in the founder and his descendants, unless there is evidence to show that the founder or his descendants have made any inconsistent disposition. *Gossamee Sree Greedharreejee v. Ramanlollijee Gossamee* (1), *Sheoratan Kunwari v. Ram Purgash* (2) and *Mussumat Jai Bansi Kunwar v Chattar Dhari Sing* (3) followed.

THIS was a suit by which the plaintiffs as founders of a religious endowment asked for a declaratory decree that certain property scheduled in the plaint was endowed property dedicated to the Sangat Nanak Shahi; that the defendants had no right of their own to that property and that the plaintiffs had authority to appoint on their behalf any person they chose as manager of the endowed property. The defendants claimed that the property in dispute was not endowed property, but was the property of one Baba Sadho Ram, whose heirs they were They denied that the plaintiffs had any concern whatever with the property in suit or any right to appoint a manager in succession to Sadho Ram.

* First Appeal No. 153 of 1904 from a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Cawnpore, dated the 19th of May 1904.

(1) (1880) L. R., 16 I. A., 137; I. L. R., 17 Calc., 3.
(2) (1896) I. L. R., 18 All., 227.
(3) (1870) 5 B. L. R., 181.

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The Court of first instance (Subordinate Judge of Cawnpore) found that the property in suit was endowed property, but dismissed the plaintiffs' suit upon the ground that they had not shown that they had a right to appoint managers of the property.

The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Babu *Durga Charan Banerji*, for the appellants.

Babu *Parbati Charan Chatterji* and Munshi *Gokul Prasad*, for the respondents.

KNOX, ACTING C.J., and DILLON, J.—This first appeal arises out of a suit brought by the appellants who were plaintiffs in the Court below. According to them, they in Sambat 1914, corresponding to the year 1857, made a religious endowment consisting of certain buildings situate at Sarsya Ghat in the city of Cawnpore.

The religious endowment was for the promotion of the Nanak Shahi religion. They installed one Baba Gobind Das to carry out all the necessary rites connected with the endowments, and in succession to him they also appointed one Baba Sadho Ram. Upon Baba Sadho Ram's death they appointed as a temporary measure Baba Kirpal Das to carry on the duties connected with the Sangat until such time as they could make a further appointment.

The first four defendants, who represent themselves as Nanak Shahi Fakirs and as disciples of Baba Sadho Ram and also of Baba Kirpal Das, aforesaid, denied the plaintiffs' title to make any appointment to the religious endowment. They attempted to realize certain bonds belonging to the religious endowment on the ground that these bonds and the properties connected with the endowment were the self-acquired property of Baba Sadho Ram. The plaintiffs accordingly asked for a declaratory decree to the effect that the property scheduled in the plaint was endowed property dedicated to the Sangat Nanak Shahi; that the defendants had no right of their own to that property, and that the plaintiffs had power to appoint on their behalf any person they liked as manager. The defence was that the property in dispute was not the Sangat property, nor was Baba Sadho Ram a superintendent, nor was he appointed on behalf of the plaintiffs. The

whole of the property in dispute was the self-acquired property of Baba Sadho Ram. The property had been purchased in his name and stood in his name in the khewats and other revenue papers. He was not a manager on behalf of, or subordinate to, the plaintiffs. All suits which it had been necessary to bring in respect of these properties had always been brought by Baba Sadho Ram in his own right. Baba Sadho Ram died intestate, and the answering defendants being his disciples are entitled to succeed him. Baba Kirpal Das, defendant No. 5, filed a separate written statement, but it is not necessary to enter at length into what was stated therein, except to say that he sets up in himself a right as Mahant of the Sangat upon appointment by the plaintiffs. Four issues were framed by the Court below, but only the third and the fourth require consideration for the purpose of this appeal. They are as follows:—3rd. Whether the property in suit appertaining to the Sangat is dedicated property; 4thly, if so, whether the plaintiffs have any title to the property as superintendents and also have a right to appoint a successor of Baba Sadho Ram. The learned Subordinate Judge decided the third issue in the plaintiffs' favour and gave them a declaration to the effect that the properties in question are endowed property appertaining to the Sangat at Sarsya Ghat. He dismissed that portion of the plaintiffs' claim in which they seek for a declaration that they are superintendents of the property and have the power to appoint any person they like as a manager. The arguments addressed to us during the hearing of this appeal referred only to this portion of the reliefs claimed. The respondent has printed no evidence, and throughout the hearing of this appeal our attention was confined to the evidence printed by the appellants. The plaintiff went into the witness-box and said without any hesitation that the appellant had absolute power to appoint whomsoever they liked for the worship of the Granth Saheb. He gave the origin of the endowment, deposed that first Baba Gobind Das, and, in succession to Baba Gobind Das, Baba Sadho Ram after an interval was appointed by the appellants as the superintendent of the endowment. He gave more than one instance of direct interference in the affairs of the endowment, and it was not elicited by cross examination that in making the

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endowment the founder had imposed any limitation on their powers with regard to the same. His statement was confirmed by the evidence of Kirpal Das, who, while, it is true, stating that all who belonged to the sect had power to appoint Mahants, said that the plaintiffs had more authority than others because the buildings belong to them. They installed Granth Saheb. To the same effect is the deposition of Fatch Singh and Gopal Singh who belong to this form of worship. A witness, Bakhtawar Singh, claimed to have been present on the day Baba Sadho Ram was installed, and he says his installation was the work of Sheo Prasad, one of the appellants. The witness Ram Charan gives a very graphic account of the filling up of the vacancy caused by the disappearance of Baba Govind Das. He too says that Baba Sadho Ram was appointed by Lala Sheo Prasad. Baba Kishan Das confirms him in this. In short, we have very strong and voluminous evidence showing that the religious endowment was founded by the appellants and that each of the two Mahants in turn who had presided over it had been appointed by the appellants. Upon this finding the proposition of law enunciated by their Lordships of the Privy Council in the case of *Gossamee Sree Greedhareejee* v. *Rumanlolljee Gossamee* (1) would apply. Their Lordships say:—"According to Hindu law, when the worship of a Thakur has been founded, the Shebaitship is held to be vested in the heirs of the founder in default of evidence that he deposed of it otherwise or there has been some usage, course of dealing or some circumstance to show a different mode of devolution." The rule of law laid down in that case was applied by this Court in the case of *Sheoratan Kunwari* v. *Ram Pargash*. (2) It was for the respondents to establish that the appellants had divested themselves, either at the foundation or afterwards, of the powers which naturally belong to them. This they have not done. In the present case, moreover, as no one has been shown to be entitled to succeed Baba Sadho Ram, the right of management reverts to the heirs of the founder (see *Mussumat Jai Bansi Kunwar* v. *Chattar, Dhari Sing* (3). It cannot be claimed for Baba Sadho Ram that he held the office

(1) (1889) L. R., 16 I. A., 137; I. L. R., 17 Calc., 3.
(2) (1896) I. L. R., 18 All., 227.
(3) (1870) 5 B. L. R., 181.

of trustee of this religious endowment, for it will be remembered that the case set up by the defendants is that the endowment is not a religious endowment, and that all the buildings and other property, the subject-matter of this appeal, are the self-acquired property of Baba Sadho Ram. This neither the Court below found, nor do we find supported by any evidence that has been shown to us. If no trust was created, then the nomination vests by law in the founder and his heirs, unless there has been some usage or course of dealing which points to a different mode of devolution—see *Sheovatan Kunwari* v. *Ram Pargash*, (1). The result is that we allow this appeal and modify the decree of the Court below so far that we decree the plaintiffs' suit in full, with costs as against all the respondents save Kirpal Das.

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SHEO PRASAD v. AYA RAM.

Before Mr. Justice Banerji and Mr Justice Aikman.

1907 *July 11*

JAMNA PRASAD AND OTHERS (DEFENDANTS) v. RAM PARTAP AND OTHERS (PLAINTIFFS) *

Hindu law—Mitakshara—Joint Hindu family—Ancestral property—Property inherited from maternal grandfather.

Held that a son in a joint Hindu family does not acquire by birth an interest jointly with his father in property which the latter inherits from his maternal grandfather *Vythinatha Ayyar* v *Yeggia Narayana Ayyar* (2) dissented from. *Sudarsanam Maistri* v *Narasimhulu Maistri* (3) discussed. *Venkayyamma Garu* v *Venkataramanayyamma Bahadur Garu* (4) *Karuppai Nachiar* v *Shankaranarayanan Chetty* (5) and *Chatturbhooj Meghji* v. *Dharamsi Naranji* (6) referred to.

THE plaintiffs in this case sued as the sons of one Rajit Pande to have a sale deed executed by their father in favour of the defendants set aside upon the ground that the property sold is joint ancestral property in which the plaintiffs had a share and that their father Rajit Pande was not competent to sell it. Other pleas were taken by the plaintiffs, but they were abandoned in the Court of first instance The property in question was admittedly inherited by Rajit Pande from his maternal grandfather, Acharaj Upadhia. The contention of the defendants was that

* Second Appeal No 916 of 1906 from a decree of R. L. H Clarke, Esq., District Judge of Gorakhpur, dated 7th of June 1906, confirming a decree of Munshi Achal Bihari, Subordinate Judge of Gorakhpur, dated the 22nd of March 1906.

(1) (1896) I. L. R., 18 All., 227.
(2) (1903) I. L. R., 27 Mad., 382
(3) (1901) I. L. R. 25 Mad., 142.
(4) (1902) I. L. R., 25 Mad., 678
(5) (1903) I. L. R., 27 Mad., 300
(6) (1884) I. L. R., 9 Bom., 438

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as the property was inherited in this manner by Rajit the plaintiffs acquired no interest in it and could not question the alienation made by their father. The Court of first instance (Subordinate Judge of Gorakhpur) decreed the plaintiffs' claim as to five sixths of the property in suit, subject to the payment of Rs. 197, which it held to be an antecedent debt which had been properly discharged out of the consideration for the sale. On appeal this decree was affirmed by the District Judge. The defendants appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Munshi *Gobind Prasad* for the appellants.

Babu *Satya Chandra Mukerji*, for the respondents.

BANERJI and AIKMAN, JJ.—The plaintiffs, who are the five sons of one Rajit Pande, brought the suit which has given rise to this appeal to have a sale deed executed by Rajit Pande in favour of the appellants set aside, on the ground that the property sold is joint ancestral property in which the plaintiffs have a share and that their father Rajit Pande was not competent to sell it. They also alleged other grounds in their plaint, such as insanity and want of consideration, but these were abandoned at the hearing in the Court of first instance. It is admitted that the property in question was inherited by Rajit Pande from his maternal grandfather Acharaj Upadhya. The widow of Acharaj inherited the property from her husband and after her Rajit Pande inherited it. It was contended on behalf of the defendants appellants that as the property was inherited by Rajit from his maternal grandfather, the plaintiffs acquired no interest in it and that they are not entitled to question the sale made by their father. The Court of first instance decreed the claim in respect of five sixths of the property, subject to the payment of a sum of Rs. 197, which it held to be an antecedent debt which had been properly discharged out of the consideration for the sale. This decree of the Court of first instance has been confirmed by the lower appellate Court.

The Courts below have relied on the ruling of the Madras High Court in *Vythinatha Ayyar* v. *Yeggia Narayana Ayyar* (1), which is based upon the ruling of their lordships of the Privy

(1) (1903) I L R, 27 MAD., 300, at page 312.

Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (1). The ruling relied upon no doubt supports the view adopted by the Courts below, but with reference to it Mr. Mayne in the 7th edition of his work on Hindu Law (page 768) observes as follows:—'How far the latter decision is justified by it (the decision of the Privy Council) is a question which may hereafter admit of considerable discussion.' The question to be determined in this case is whether property inherited from the maternal grandfather is ancestral property within the meaning of the Mitakshara in which a son by his birth acquires an interest jointly with his father. As pointed out by Mr. Mayne in paragraph 275, the term "ancestral property" in its technical sense is "property which a man inherits from a direct male ancestor not exceeding three degrees higher than himself * * * * * and is at once held by himself in co-parcenary with his own issue." In the same paragraph he states that "property which a man inherits from a female or through a female, as for instance a daughter's son, or which he has taken from an ancestor more remote than three degrees, or which he has taken as heir to a priest or fellow-student would not be ancestral property." This view is supported by the authorities to which he refers. It is true that in Colebrook's translation of the Mitakshara, Chapter I, section 1, sub-section 27, it is stated that "it is a settled point that property in the paternal or ancestral estate is by birth," but, as pointed out in Mr. J. C. Ghose's Hindu Law, 2nd edition, p 375, the word "ancestral" in this *placitum* is a mistranslation, the correct translation being, "property in the paternal or grand-paternal estate is by birth," as the word in the original text is *pitamaha*, that is, paternal grandfather. It is clear therefore that under the Mitakshara the only property in which a son acquires an interest by birth jointly with his father is property which has come to the father from his own father and not from an ancestor in the maternal line. This is further manifest from the Mitakshara, Chapter I, section 5, sub-section 1 of which shows that the section deals with "the division of the grandfather's effects by the grandson." In section 5 it is stated that "in such property which was acquired by the paternal grandfather

(1) (1902) I. L. R., 25 Mad., 678.

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* * * the ownership of father and son is notorious * * * for (or because) the right is equal or alike, therefore partition is not restricted to be made by the father's choice." As the right acquired by a son on his birth jointly with his father is thus limited to property which belonged to the paternal grandfather, the son does not acquire a right by birth equal to his father's in property which has come to the father from his maternal grandfather. (See also the observations contained in the Full Bench ruling of the Madras High Court in *Karuppai Nachiar* v. *Shankaranarayanan Chetty*, (1), *at p.* 312).

Has this rule been varied or departed from by their Lordships of the Privy Council in the ruling to which we have already referred? As we read the judgment a different rule has not been laid down. The question before their lordships was whether in respect of property which had devolved from their maternal grandfather on two brothers who formed members of a joint family the rule of survivorship applied and the property passed on the death of one of the brothers to the surviving brother. Their Lordships held that the surviving brother would take the property to the exclusion of the widow of the deceased brother. That was the only question which their Lordships had to consider and which they determined. The question before us, namely, whether the son of a person who inherited property from his maternal grandfather acquires by birth an interest in such property equally with his father, did not arise in that case and was not decided. Their Lordships no doubt say that "in the grandfather's hands it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance (page 686)." We do not think, however, that the words "ancestral property" were used in the limited sense in which they are used in the Mitakshara, namely, property in which the sons acquire by birth a joint interest with their father. Having regard to the arguments addressed to their Lordships by Mr. Mayne, which met with their approval, and the instances of joint ownership referred to in the judgment, the only question which appears to have been considered was whether when property devolved by inheritance on

(1) (1903) I. L. R., 27 Mad., 300.

persons who were members of a joint family the rule of survivorship applied, and the question what constituted ancestral property in the technical sense of the Mitakshara was not discussed or decided. It is a well known rule of the Mitakshara law that property may be joint property without having been ancestral. In the case of such joint property it has never been held that a son would by birth alone acquire an interest in the property. This appears to have been the view adopted by the Bombay High Court in *Chatturbhooj Meghji* v. *Dharamsi Naranji* (1), and that seems to be the opinion of Mr. Mayne also (see paragraph 277). Having regard to the whole context of the rules laid down by the Mitakshara it is clear that it is only in the case of property which was derived from a paternal ancestor that such property becomes the joint property of the father and his son and we should have considerable hesitation in agreeing with the opinion expressed by Bhashyam Iyengar, J., in *Sudarsanam Maistri* v. *Narsimhulu Maistri* (2) if he thereby intended to hold the contrary. For the above reasons we are unable to hold that a son by birth acquires an interest jointly with his father in property which the latter inherited from his maternal grandfather and we cannot agree with the ruling of the Madras High Court in *Vythinatha Ayyar* v. *Yeggna Narayan Ayyar* (3). The present suit was therefore not maintainable on the ground on which it was decreed by the Courts below. As we have said above, the other grounds taken in the plaint were abandoned in the Court of first instance.

The result is that we allow the appeal, and, setting aside the decrees of the Court below, dismiss the suit with costs in all Courts.

Appeal allowed.

(1) (1884) I. L. R., 9 Bom., 438. (2) (1902) I. L. R., 25 Mad., 149, at page 156

(3) (1903) I. L. R., 27 Mad., 482

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June 11.

FULL BENCH.

Before Sir George Knox, Acting Chief Justice, Mr. Justice Banerji and Mr. Justice Richards.

SADHO LAL (DEFENDANT) *v.* MURLIDHAR (PLAINTIFF) *

Act No. VIII of 1890 (Guardians and Wards Act), section 32—Act No. IX of 1875 (Indian Majority Act), section 3—Guardian and minor—Effect of appointment of guardian—Civil Procedure Code, section 440.

Where a guardian has once been appointed under the provisions of Act No. VIII of 1890, the attainment of majority by the ward is postponed until he reaches the age of twenty-one years notwithstanding that the guardian appointed by the Court may be discharged before that time arrives. *Gordhandas Jadunath v. Hariballabdas Bhandas* (1) followed. *Pateswri Partap Narain Singh v. Champa Lal*, (2) distinguished.

THE facts out of which this appeal arose are as follows:—

On the 6th of January 1904 the District Judge of Agra, acting under the provisions of Act No. VIII of 1890, appointed one Sadho Lal guardian of the person and property of one Murlidhar, who was then a minor of about fifteen years of age. Sadho Lal continued to act as guardian until the 11th of January 1906, when he applied to be permitted to resign his office as guardian. Upon this application the District Judge passed an order to the following effect:—"He is discharged under section 40 of Act No. VIII of 1890, and has handed over Rs. 19-9-9, which Murlidhar's pleader accepts under protest, stating that he does not admit the correctness of the accounts. The discharge will not absolve Sadho Lal from liability for any fraud that may subsequently be discovered." After the passing of this order Murlidhar, who was then between the ages of eighteen and twenty-one, filed in person a suit against his late guardian claiming certain money, which he alleged to be still in the hands of the defendant. The Court of first instance overruled the plea taken by the defendant that the plaintiff was still a minor, but dismissed the suit on other grounds. The plaintiff appealed, and the lower appellate Court reversed the decree of the first Court and remanded the suit under the provisions of section 562 of the Code of Civil Procedure. From this order the defendant appealed to the High Court.

* First Appeal No. 105 of 1906 from an order of Babu Shiva Prasad, Subordinate Judge of Agra, dated the 7th of September 1906.

(1) (1896) I. L. R., 21 Bom., 281. (2) Weekly Notes, 1891, p. 118.

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Lala *Kedar Nath*, for the appellant, contended that the effect of the appointment of a guardian was to postpone the attainment of majority by the ward to the age of twenty-one, and it made no difference that the guardian had been discharged. He referred to section 3 of Act No. IX of 1875 and section 52 of Act No. VIII of 1890. It was submitted that the ruling in *Pateswri Partap Narain Singh* v. *Champa Lal* (1), upon which the Courts below had relied, was in conflict with the later ruling in *Khwahish Ali* v. *Sarju Prasad* (2) and had been wrongly decided. In the latter case the earlier ruling had apparently not been brought to the notice of the Court. Reliance was also placed on *Gordhandas Jadowji* v. *Harivallubhdas Bhardas* (3) and *Rudra Prokash Misser* v. *Bhola Nath Mukherjee* (4).

Dr. *Satish Chandra Banerji*, for the respondent, contended that the case of *Pateswri Partap Narain Singh* v. *Champa Lal* had been rightly decided. The words "has been or shall be" in section 3 of Act No. IX of 1875 imply that the guardian is in existence; otherwise the Legislature might have said "a guardian was at some time appointed." The perfect tense was deliberately used to imply continuity. If no guardian were appointed, the minor would attain majority at eighteen and be competent to maintain a suit. This right should not be restricted where the appointment of a guardian is more nominal than real, and by the time the minor completes his eighteenth year the guardian ceases to exist. The Statute should be strictly construed. Maxwell on the Interpretation of Statutes, 3rd edition, pp. 122, 427.

KNOX, ACTING C.J., and BANERJI and RICHARDS, JJ.—The parties to this appeal are respectively Murlidhar, who was plaintiff in the Court below, and Sadho Lal, the present appellant, who was defendant. On the 6th of January 1904 the District Judge of Agra, acting under the provisions of Act No. VIII of 1890, appointed Sadho Lal guardian of the person and property of Murlidhar, who was then a minor of about 15 years of age. Sadho Lal continued to act as guardian up to the 11th of January 1906. He then applied to resign his office as guardian. The District Judge passed an order which was the subject of argument in the Court below, and which in the present appeal the appellant

(1) Weekly Notes, 1891, p. 118
(2) (1881) I. L. R., 3 All., 396.
(3) (1896) I. L. R., 21 Bom., 281.
(4) (1886) I. L. R., 12 Calc., 612.

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claimed to be an order of absolute discharge. As we are able to decide this appeal upon the other pleas taken in the memorandum of appeal, we do not intend to do more than point out that all that the learned Judge of Agra in his order says is as follows:—"He is discharged under section 40 of Act No. VIII of 1890 and has handed over Rs. 19-8-9, which Murlidhar's pleader accepts under protest, stating that he does not admit the correctness of the accounts. The discharge will not absolve Sadho Lal from liability for any fraud that may be subsequently discovered." The learned Judge does not, as he might have done, declare him to be discharged from liability. After this order passed by the learned Judge, Murlidhar in person filed a suit in Court, in which he lays claim to certain money as being in the hands of Sadho Lal. The defence to the suit was that Murlidhar was still a minor and being a minor could not sue without a next friend. At the time when he instituted the suit Murlidhar had attained 18 years of age, but was admittedly below the age of 21. The Court of first instance overruled the plea of minority, but dismissed the suit on other grounds. The lower appellate Court agreed with the Court of first instance on the question of minority, but held that the suit was not barred by Act No. VIII of 1890, as held by the first Court. It accordingly remanded the case to the Court of first instance under the provisions of section 562 of the Code of Civil Procedure for disposal on the merits. In appeal before us it was contended that, the respondent not having attained the age of 21 when he brought the suit was not competent to maintain it, and under the provisions of section 444 of the Code of Civil Procedure the order of the lower Court ought to be discharged. Reliance was placed on the provisions of section 3 of Act No. IX of 1875 as amended by section 52 of Act No. VIII of 1890. The language of that section is plain and free from all ambiguity, and it would not really have been necessary to have this appeal decided by a Full Bench of this Court, but for the ruling in the case of *Pateri Partap Narain Singh* v. *Champa Lal* (1). The learned Judges who decided that case held that the mere fact of the appointment of a guardian would not operate to postpone the attainment of majority by a minor till he reaches the age of 21. That case was, however, a case instituted

(1) Weekly Notes, 1891, p. 118.

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before section 3 of Act No. IX of 1875 had been amended. The amendment makes it very clear that the Legislature does intend that when a guardian has been appointed, even if that guardian afterwards resigns or for any other reason ceases to act as guardian, the attainment of majority by a minor is postponed until he has completed his age of 21 years. The same view was taken by the Bombay High Court in the case of *Gordhandas Jadowji* v. *Harivallabhdas Bhaidas* (1). As the suit was instituted before the plaintiff had attained the age of 21, the institution of the suit by the minor before he attained majority was a violation of the provisions of section 440 of the Code of Civil Procedure. In view of the order that we are about to make we think it well to draw attention to the provisions of section 36 of Act No. VIII of 1890. The appeal is decreed; the orders of both the Courts below are set aside, and the case is sent back to the Court of first instance with directions to return the plaint to be represented, if thought desirable, by a next friend, after that next friend has obtained the necessary sanction from Court. We make no order as to costs.

Appeal decreed.

APPELLATE CIVIL.

1907
July 12.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.

RAMCHANDRA DAS (DEFENDANT) v. JOTI PRASAD AND OTHERS (PLAINTIFFS) *

Civil Procedure Code, section 444—Guardian ad litem*—Duty of Court as regards appointment of a guardian* ad litem.

Where the defendant or respondent to a suit or appeal is a minor it is the duty of the Court not only to appoint a guardian, but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. *Mussammat Bibi Waliun* v. *Banke Behari Pershad Singh* (1) distinguished.

THE facts of this case are as follows:—

THE plaintiffs instituted a suit asking for a declaration as to an alleged right of way over the defendant's land. The Court of

* First Appeal No. 133 of 1906, from an order of L. M. Stubbs, Esq., District Judge of Saharanpur, dated the 17th of July 1906.

(1) (1896) I. L. R., 21 Bom., 281. (2) (1903) L. R., 30 I. A., 162.

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first instance dismissed the suit. After the suit had been dismissed the defendant died. The plaintiffs thereupon filed an appeal, putting the name of Musammat Pavitra Mati as guardian of Mahant Ram Chandar Das, *alias* Paras Ram, the successor in title of the deceased defendant. On the 13th of February 1906 the plaintiffs applied that the Musammat, who was the step-mother of the minor, might be appointed his guardian *ad litem* and on the 17th of February 1906 an order that notice should go to show cause against such appointment was made. It appears that these notices were never issued, and fresh notices were ordered to issue for the 17th of July following, which was also fixed as the date of trial. On that day Musammat Pavitra Mati did not appear at the commencement of the hearing; but appeared before the judgment was concluded and informed the Court that she was a *parda-nishin* lady and was not a fit and proper person to be appointed a guardian *ad litem* for the minor. She named one Har Narain as a fit and proper person, and one who would be able to look after the interests of the minor. Upon this application the Court made an order in the following words:—"I have heard the argument in this appeal and cannot accept this application at this late hour. Refused."

Against this order the defendant appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Lala *Kedar Nath*), for the appellant.

Babu *Jogindro Nath Chaudhri* and Mr. *M. L. Agarwala*, for the respondents.

RICHARDS, J.—This was a suit brought by the plaintiff for a declaration as to an alleged right of way over the defendant's land. The Court of first instance dismissed the suit. After the suit had been dismissed the defendant died. The plaintiffs thereupon filed an appeal, putting the name of Musammat Pavitra Mati as guardian of Mahant Ram Chandar Das, *alias* Paras Ram, the successor in title of the deceased defendant. On the 13th of February 1906 the plaintiffs applied that the Musammat, who was the step-mother of the minor, might be appointed his guardian *ad litem*, and on the 17th of February 1906 an order that notice should go to show cause against such appointment was made. It appears from the order of the 16th June that these

notices were never issued, and fresh notices were ordered to issue for the 17th of July following, which was also fixed as the date of trial. From the order sheet of the 17th of July a recital appears that the Musammat had not appeared and also an order that the appeal should be heard *ex parte*. On the same day the Musammat had appeared before the judgment was concluded, informed the Court that she was a *parda-nishin* lady and was not a fit and proper person to be appointed a guardian *ad litem* for the minor. She named Har Narain as a fit and proper person, and one who would be able to look after the interests of the minor. The only order that appears after this protest of the Musammat is in the following words:—"I have heard the argument in this appeal and cannot accept this application at this late hour. Refused." It seems to me that the proceedings had been quite irregular from the very institution of the appeal. The appeal ought never to have been admitted until after the Court had appointed a proper person to be the guardian of the minor. Up to the present moment there has been no order appointing a guardian to the minor. It is the duty of the Court not only to appoint a guardian but to satisfy itself that the proposed guardian is a fit and proper person to represent the minor, to put in a proper defence and generally to act in the interests of the minor. The duty of the Court is not a mere matter of form. In the present case the learned Judge fixed a date for the trial of the case for the same day as the day fixed for the appointment of a guardian. It may well be asked how the guardian could be expected to be prepared to look after the interests of the minor, to instruct pleaders to act and to get witnesses on the very day on which the appointment was made. I cannot help feeling astonished that the learned Judge should have proceeded to make an *ex parte* decree against a minor on the day which he had fixed for the appointment of the guardian. I am still more astonished that he should have made the order that he did make, after the appearance of the Musammat bringing under his notice that she could not and would not act as a guardian of the minor. I would desire to draw the particular attention of the learned Judge to the provisions of section 444 of the Code of Civil Procedure, and also to remind him that it is the duty of the Courts of Justice to protect

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in every possible way the interests of minors. I would allow the appeal with costs.

KNOX, ACTING C.J.—I agree with my learned brother that we have no alternative but to set aside the order appealed from, and I must admit that I am very much surprised at the undue haste and disregard of the law which has characterized the proceedings of the lower appellate Court. There was a time when the Courts were very remiss in following the provisions laid down in Chapter XXXI of the Code of Civil Procedure of 1882 and the corresponding Chapters in the former Codes, but I hoped that by this time Courts have fully recognized that the appointment of a guardian *ad litem* is not a matter in the hand of the opposite party, but that it is the duty of the Judge when it is brought to his notice that a defendant or respondent is a minor, himself to decide who is the proper person to be appointed as a guardian *ad litem*. If any inference can be drawn from the appeal before the Court of the District Judge of Saharanpur it would appear that that Court has relapsed into the old careless way. I notice that in the memorandum of appeal the appellant inserts as a matter of course and without any reference to the Court the person who is to be appointed as guardian *ad litem*. I notice that the Munsarim, who is a Munsarim of long standing, has passed the memorandum of appeal as not open to any objection on this score. I also notice that, as my learned brother has pointed out, the learned Judge appears to have considered that the guardian *ad litem* could immediately on his appointment properly defend the interests of the minor. The appeal should never have been admitted on the register of appeals until the Judge had determined who was the proper person to be appointed as a guardian. In this case the result has been very disastrous. A minor whose interests are especially under the care of the Judge has had an *ex parte* decree passed against him without any person appointed as a guardian and in the face of a careful remonstrance addressed to the Judge by the person whom the appellants have proposed as a guardian *ad litem* to the effect that she was a *purda-nishin* lady not in a position to properly guard the interests of the minor and that there was a person who was fitted and who was a proper person so to be appointed. On behalf of the respondents it is argued

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that the case of *Musammat Bibi Walian* v. *Banke Behari Pershad Singh* (1) was an authority to the effect that the absence of a formal order appointing a guardian was a mere irregularity which under section 578 would not be a ground for reversing the judgment. But that was a suit brought to set aside a decree in which their Lordships of the Privy Council were satisfied that in the suit in which the decree had been obtained the minor's interests had been effectively represented by their mother, who appeared throughout the proceedings as their guardian *ad litem*. In the present case the minor's interests had been entirely disregarded.

BY THE COURT.—We decree the appeal, set aside the order under appeal and return the case to the lower appellate Court with instructions to readmit it on the file of pending appeals and to dispose of it according to law in the presence of the guardian *ad litem* who has since been appointed by this Court. The respondents will pay the costs of the appellant in this Court.

Appeal decreed.

Before Mr. Justice Griffin.

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July 16.

RAGHUNANDAN PRASAD (PLAINTIFF). *v.* AMBIKA SINGH AND OTHERS (DEFENDANTS) *

Act No. IV of 1882 (*Transfer of Property Act*), *section* 91—*Mortgage—Redemption—Who may redeem—Perpetual lessee.*

In a suit for redemption of a mortgage the plaintiff was a perpetual lessee of the mortgaged premises from the mortgagor, holding under a lease granted upon payment of a premium of Rs. 800, with a yearly rental of Rs. 40 odd. By the terms of the lease the lessee was not liable to be ejected, even for non-payment of rent, while, if the title of the lessors proved defective, the lessee was entitled to a refund of the premium.

Held that the lessee was under the above circumstances entitled to redeem.

Paya Matathil Appu v *Kovamal Amina* (2), *Radha Pershad Misser* v. *Monohur Das* (3), *Jugul Kissore Lal Sing Deo* v. *Kartic Chunder*

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* Second Appeal No 936 of 1904, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 27th of May 1904, reversing a decree of Babu Bansgopal, Munsif of Ballia, dated the 11th of December 1900

(1) (1903) L R, 30 I. A., 182 (2) (1895) I. L. R, 19 Mad, 151,
(3) (1880) I. L R., 6 Calc, 817.

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Chottopadhya (1), *Kasummissa Bibee* v. *Nilratna Bose* (2), *Girish Chunder Day* v. *Juramoni Do* (3) and *Ram Subhag* v. *Nar Singh* (4) referred to.

THE plaintiff in this case, describing himself as a permanent lease-holder under an instrument of the year 1897 sued to redeem a mortgage created by the predecessor in title of his lessor in the year 1840 over a property of which the sir land leased to the plaintiff formed part. The terms of the lease under which the plaintiff held were to the following effect:

In consideration of a sum of Rs. 800 premium the plaintiff is placed in possession of the sir lands specified in the document, and, subject to the yearly payment of the rent of Rs. 40-6-6, he can do whatever he likes with the property. Even for non-payment of rent he may not be ejected, and the lessors have their remedy to recover their rent by proceeding against other property. If the title of the lessors is found to be defective, they are liable to repay the Rs. 800 premium. The lease was one in perpetuity.

The Court of first instance (Munsif of Ballia) decreed the plaintiff's claim. The defendant appealed, and the lower appellate Court (Subordinate Judge of Ghazipur), holding that the terms of the lease under which the plaintiff held did not confer on him the rights to ask for redemption of the mortgage of 1840, allowed the appeal and dismissed the suit.

The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad* and Munshi *Haribans Sahai*, for the appellant.

Mr. *W. Wallach* and Maulvi *Muhammad Ishaq*, for the respondents.

GRIFFIN, J.—The plaintiff, who is described as a *istimrari pattadar* (permanent lease-holder) under an instrument of the year 1897 in respect of certain sir land, sues to redeem a mortgage created by the predecessor in title of his lessor in the year 1840 over a property, of which the sir land leased to the plaintiff is a part. The question for decision in this appeal is whether the plaintiff has such an interest in the mortgaged property as would give him a right to redeem under the provisions of section 91 of the Transfer of Property Act. The lower appellate Court has held that the plaintiff has no such interest under his lease as

(1) (1892) I. L. R., 21 Calc., 115.
(2) (1881) I. L. R., 8 Calc., 73.
(3) (1900) 5 C. W. N., 83
(4) (1905) I. L. R., 27 All., 472.

would confer upon him the right to come in and ask to redeem the property.

The plaintiff comes in second appeal to this Court, and it is contended that under the special conditions of the lease in the plaintiff's favour he has such an interest in the property as would confer upon him the title to come in and redeem. The terms of the so-called *patta* are somewhat peculiar.

In consideration of a sum of Rs. 800 premium the plaintiff is placed in possession of the sir lands specified in the document, and, subject to the yearly payment of the rent of Rs. 40-6-6, he can do whatever he likes with the property. Even for non-payment of rent he may not be ejected, and the lessors have their remedy to recover their rent by proceeding against other property. If the title of the lessors is found to be defective, they are liable to repay the Rs. 800 premium. The lease was one in perpetuity. The terms of the document would, no doubt, bring it under the definition of "lease" as given in the Transfer of Property Act. The effect of the document is to confer all rights of ownership upon the plaintiff, subject to payment of a yearly rent. I am referred on behalf of the appellant to the following rulings:—*Paya Matathil Appu* v. *Kovamel Amina* (1), *Radha Pershad Misser* v. *Monohur Das* (2), *Jugul Kissore Lal Sing Deo* v. *Kartic Chunder Chottopadhya* (3), *Kasumunnisa Bibee* v. *Nilratna Bose* (4) and *Ram Subhag* v. *Nur Singh* (5).

In the last case it was held that a sub-mortgagee had a right to redeem a prior mortgage. In the Madras case it was held that the word "interest" was not necessarily confined to a right of ownership, but was sufficiently large to include any minor interest such as that of a tenant or a person having a charge. In the same judgment we find a dictum of Fry, L. J., to the following effect:—"According to the general law of the land a person who claims as lessee under a mortgagor after the mortgage and has thereby derived an interest in the equity of redemption has the right to redeem."

The Calcutta cases deal with the rights of *patnidars*. In the case reported in 8 Calc., 79, I find at p. 87 the observation of

(1) (1895) I. L. R., 19 Mad., 151.
(2) (1880) I. L. R., 6 Calc., 317
(3) (1892) I. L. R., 21 Calc., 116.
(4) (1881) I. L. R., 8 Calc., 79.
(5) (1905) I. L. R., 27 All., 472.

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Pontifex, J., to the following effect:—"In this country *patnis*, *zare peshgi* leases and interests of that nature are very considerable interests in the land and cannot be looked upon as mere leases for a term of years, which a mortgagee might have the right to disregard. They are in fact substantial proprietorial interests, on the grant of which, as in this case, considerable premiums are paid; and it is only equitable that persons in that position should be allowed the opportunity of preserving their interests by redeeming any mortgages made by the superior holder."

In a more recent case—*Girish Chunder Dey* v. *Juramoni De* (1), it was held that a person holding a *ryati* interest in property had no such interest as would confer upon him a right to redeem the property. Upon the facts as stated in the report I am unable to ascertain what were the terms of the *ryati* lease in favour of the plaintiff in that case.

For the respondent I am referred to section 85 of the Transfer of Property Act, and it is contended that the plaintiff had no such interest in the property mortgaged as would render it necessary for him to be joined as a party under the provisions of that section. The test I am asked to apply is whether the plaintiff had such an interest in the mortgaged property as would be affected by the mortgage. Looking to the peculiar terms of the document under which the plaintiff holds, I am of opinion that the plaintiff had such an interest in the property as would confer upon him the right to come in and ask to redeem. The plaintiff cannot be described as a mere tenant or an ordinary lessee. Subject to the payment of this fixed amount every year he has all the rights of ownership.

The view that I take in this case is based upon the peculiar facts of the case. I must therefore allow the appeal, set aside the decree of the lower appellate Court and remand the case for trial on the merits. Costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

(1) (1900) 5 C. W. N., 83.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1907
July 24.

BARSATI AND OTHERS (DEFENDANTS) *v.* CHAMRU AND ANOTHER, PLAINTIFFS.*

Suit for declaration of right to receive fees as "Chowdhris" of certain bazars —Suit not maintainable

The plaintiffs sued for a declaration that they were the "Chowdhris" of the bazars in the villages Muhammadabad Ghona, Khairabad and Behna, and that the defendants were not the "chowdhris" of the said bazars and were not entitled to take chowdhris' dues *Held* that such a suit was not maintainable. *Bhanuk Chowdhree* v *The Collector of Jounpore* (1), *Behares Lall* v. *Baboo* (2) and *Ram Deeknl* v *Chukkoo* (3) followed.

THIS was a suit by which the plaintiff claimed a declaration that they were "chowdhris" of the bazars of the villages of Muhammadabad Gohna, Khairabad, and Behna, and that the defendants were not "chowdhris" of these bazars and were not entitled to take chowdhri's dues. The plaintiffs also asked for an injunction restraining the defendants from offering obstruction to the plaintiffs taking their chowdhri's dues and realizing the said dues themselves. The Court of first instance (Munsif of Muhammadabad Gohna) held that the suit was in its nature not maintainable, and dismissed it. The plaintiffs appealed, and the lower appellate court (Subordinate Judge of Azamgarh) reversed the decree of the Munsif and passed a decree in favour of the plaintiffs. The defendants appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellants.

Munshi *Govind Prasad*, Maulvi *Muhammad Zahur* and Babu *Lakshmi Narain*, for the respondents.

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit brought by the respondents for a declaration that they are the chowdhris of the bazars of the villages Muhammadabad Gohna, Khairabad and Behna; that the defendants are not the chowdhris of the said bazars, and that they are not entitled to take chowdhris dues. The plaintiffs also asked for an injunction restraining the defendants from offering obstruction to the plaintiffs taking their chowdhris' dues and realizing the said dues themselves. They

* Second Appeal No. 1163 of 1905, from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 31st of August 1905, reversing a decree of Maulvi Muhammad Abdul Latif, Munsif of Muhammadabad Gohna, dated the 30th of June 1904.

(1) N.-W. P., H. C. Rep., 1867, p 271. (2) N.-W. P., H. C. Rep., 1867, p. 80.

(3) N.-W.P., H. C Rep., 1869, p. 281.

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further claim damages, but that part of the claim has been dismissed, and we are not now concerned with it. The Court of first instance dismissed the suit, holding that it was not maintainable. The lower appellate Court has decreed it. The defendants appeal, and they contend that a suit like this is not maintainable. In our opinion the contention is well founded. The right claimed by the plaintiffs is a vague and indefinite right. They alleged in their plaint that they were appointed chowdhris with the consent of the *baqqals* and others who sell grain, vegetables, etc., in the above-mentioned bazars. They do not say who appointed them, and the statement they make as to their duties is far from definite. It is manifest that the payments made to them by the *baqqals*, etc., for services rendered are voluntary payments and are not such as can be legally enforced. In the case of *Bhinuk Chowdhree* v. *The Collector of Jounpore* (1) it was held that the claim to receive fees as chowdhri is not a right which can be enforced by the Courts of law. In that case the learned Judges observed that the plaintiff "in substance wishes the Courts to declare him entitled to certain fees which he has heretofore been in the habit of receiving as chowdhri from persons using a certain market-place. But, although such fees may have been heretofore willingly paid to him, he had no right to such fees such as he could legally have enforced." These remarks in our opinion apply to the present case. There is another case reported on page 80 of the same volume, namely, *Beharee Lall* v. *Baboo*, in which it was held as regards the rights of *prohits* that "each *jujmun* has a right to select his own priest, and no suit to enforce such rights would lie in the Civil Court." It was observed in the course of the judgment that there was no office recognized in law which had descended on the plaintiff and conferred on him a right of suit. The principle of this ruling applies here. In *Ram Deehul* v. *Chukhoo* (2) the plaintiffs sued for establishment of their right to the office of chowdhri of boats. It was held that the suit was not maintainable on the ground that "the payments made to a person in the plaintiffs' position were voluntary payments, and those who made them were not under any legal obligation to render them to any particular individual in preference to another, nor to any person

(1) N.-W. P., H. C. Rep., 1867, p. 271. (2) N.-W. P., H. C. Rep., 1869, p. 291.

against their will." In the present case it appears that certain *baqqals*, probably a majority of them, are in favour of the plaintiffs and are willing to make payments to them. On the other hand there are a number of *baqqals* willing to make similar payments to the defendants and not to the plaintiffs. Under such circumstances it cannot be held that the plaintiffs have a right which can be enforced by a suit in the Civil Court. In our opinion the view taken by the Court of first instance was right. We allow the appeal, set aside the decree of the lower appellate Court, and restore that of the Court of first instance. The appellants will have their costs here and in the Court below.

Appeal decreed.

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BARKATI v CHAMAN.

REVISIONAL CRIMINAL.

1907 *July* 20.

Before Sir George Knox, Acting Chief Justice, Mr. Justice Aikman and Mr. Justice Richards.

EMPEROR v GANGA PRASAD.*

Act No XLV of 1860 *(Indian Penal Code), section* 499—*Act No.* I *of* 1872 *(Indian Evidence Act), sections* 105 *and* 132—*Defamation—Witness—How far witness protected when giving evidence.*

If a witness whilst giving evidence makes a statement concerning any person which amounts to defamation, he may be prosecuted under section 499 of the Indian Penal Code in respect of such statement, and it lies upon him to show that the statement which he has made falls within one or other of the exceptions to section 499 of the Code, or that he is protected from prosecution by the proviso to section 132 of the Indian Evidence Act, 1872.

So *held* by KNOX, Acting C.J., and AIKMAN, J., RICHARDS, J., *dissentiente.*

Baboo Gunnesh Dutt Singh v. *Mugneeram Chowdhry* (1), distinguished. *Bank of England* v. *Vaghiano Brothers* (2), *Norendra Nath Sircar* v. *Kamalbasini Dasi* (3), *Robinson* v. *Canadian Pacific Railway Company* (4), *Queen* v. *Purseram Doss* (5), *Scaly* v. *Ram Narain Bose* (6), *Manjaya* v *Sesha Shetti*, (7), *Queen-Empress* v *Babaji* (8), *Queen-Empress* v *Balkrishna Vithal* (9), *Bhikumber Singh* v *Becharam Sircar* (10), *Woolfun Bibi* v. *Jesarat Sheikh*

* Criminal Revision No. 754 of 1906.

(1) (1872) 11 B. L. R., 321.
(2) L. R., 1891. A C., 107.
(3) (1895) L. R., 23 I A., 18
(4) L. R., 1892, A C., 481.
(5) (1866) 2 W. R., Cr. R., 45.
(6) (1865) 4 W R., Cr R., 22.
(7) (1888) I L. R., 11 Mad., 477.
(8) (1892) I. L R., 17 Bom., 127.
(9) (1892) I. L. R., 17 Bom., 573.
(10) (1888) I. L. R., 15 Calc., 264.

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(1), *Dawan Singh* v. *Malap Singh* (2), and *Queen-Empress* v. *Gagadha* (3) referred to by Knox, Acting C.J.

Gunnesh Dutt Singh v. *Mugneeram Chowdhry* (4) distinguished *Green* v. *Delanney* (5), *Queen-Empress* v. *Balkrishna Vithal* (6), *In re Nagarji Trikamji* (7), *Angada Ram Shahe* v. *Nemat Chand Shahe* (8), *Abdul Hakim* v. *Tej Chandar Mukerji* (9), *Bank of England* v. *Vagliano Brothers* (10) and *Norendra Nath Sircar* v. *Kamalbasini Dasi* (11) referred to by Aikman, J.

Per RICHARDS, J.—A prosecution for defamation under section 499 of the Indian Penal Code will not lie against a witness in respect of any statement made by him in the course of giving evidence, even if such statement may be not relevant to the matter under inquiry. *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (4) followed. *Dawkins* v. *Lord Rokeby* (12) *Abdul Hakim* v. *Tej Chandar Mukerji* (9) and *Isuri Prasad Singh* v. *Umrao Singh* (13) referred to.

ONE Ganga Prasad was a witness for the defence on the trial of one Birbal for theft. When put into the witness box he was asked what he knew about Birbal's case. He replied that he knew nothing; but he added of his own accord that he knew that Birbal had stolen his watch eight years previously and that he had had to give ten rupees to one Banke Lal, whom he pointed out as one of the persons present in court, before he got the watch back. He said further that "if his (pointing to Banke Lal) house was searched, thousands of rupees worth of stolen property would be found." It was found that Banke Lal was a respectable zamindar, and that he was drug contractor for the Moradabad District and paid Rs. 400 as income tax. Banke Lal prosecuted Ganga Prasad for defamation in respect of these statements, Ganga Prasad was tried by the Joint Magistrate of Moradabad, was convicted, and was sentenced to three months' simple imprisonment and a fine of Rs. 500. From this conviction and sentence he appealed to the Sessions Judge, by whom his appeal was dismissed. Ganga Prasad then applied in revision to the High Court upon the main ground that he was protected as regards the words used by him with reference to Banke Lal by his position as a witness. The application came on for hearing first before Aikman, J., sitting singly, who referred it to a Bench of two Judges. It then came before Knox, Acting C.J., and Richards, J.,

(1) (1890) I. L. R., 27 Calc., 262.
(2) (1886) I. L. R., 10 All., 425.
(3) Weekly Notes, 1890, p. 170.
(4) (1872) 11 B. L. R., 321.
(5) (1870) 14 W. R., Cr. R. 27.
(6) (1893) I. L. R., 17 Bom., 573.
(7) (1894) I. L. R., 19 Bom., 34 0.
(8) (1896) I. L. R., 23 Calc., 867.
(9) (1881) I. L. R., 3 All., 815.
(10) L. R., 1891, A. C., 107.
(11) (1895) L. R., 23 I. A., 18.
(12) (1875) L. R., 7 H. L., 744.
(13) (1900) I. L. R., 22 All., 324.

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who differed in opinion as to how far the law in India gave protection to a witness, and accordingly the case was, under the provisions of section 439 (1) read with section 429 of the Code of Criminal Procedure laid before Aikman, J., for his opinion. The three opinions are given below.

Mr. *C. Ross Alston*, for the applicant. The question is whether the ten exceptions to section 499 of the Indian Penal Code exhaust the defences which are open to those who are prosecuted for what *primâ facie* is defamation. It is contended that they do not; and that in the case of a judge, an advocate or a witness it may be pleaded that the statement was privileged absolutely; the law of absolute privilege in such cases being based on considerations of public policy. It is necessary to the administration of justice that such prosecutions should not be allowed. Justice itself requires the privilege, which is not given for the benefit of the slanderer, but in the interests of the community. Every consideration which applies to such cases in England applies in India. It is not a question of Statute Law in India any more than it is in England. Nothing short of a positive enactment taking away this privilege should prevent it being successfully pleaded. Indian courts are as much concerned in upholding this privilege as English courts. See *Sullivan* v. *Norton* (1), where the subject is discussed on the civil side; also *Queen Empress* v. *Nagarji Trikamji* (2), where the subject is discussed on the criminal side. In this latter case it was suggested that section 132 of the Evidence Act was against the contention of the accused, who was a pleader. But section 132 embodies a rule of evidence merely, and has no application to this discussion. It says that a criminating answer which is forced from a witness shall not be given in evidence against him. He is thus free to tell the truth without fear of his answers being given in evidence against him. It is not contended that the answer given by the accused in this case cannot be given in evidence against him. The contention is that the answer being that of a witness does not make him liable to punishment for defamation. Section 77 of the Penal Code was said in the case last cited to cover the prosecution of a Judge. This really supports the contention now raised, for it

(1) (1887) I. L. R., 10 Mad., 28. (2) (1894) I. L. R., 19 Bom., 340.

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assumes that the right of a Judge to make defamatory remarks from the bench is "given to him by law." But where is the law which gives a Judge in India such a right, if the exceptions in the Indian Penal Code are exhaustive? Moreover if a Judge can appeal to section 77, a witness and an advocate can appeal to section 79. If considerations of public policy constitute the "law" referred to in section 77, may it not be said that the same considerations constitute the "law" referred to in section 79. If the language of their Lordships of the Privy Council in the case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (1) is taken literally, the question now raised has been decided by authority binding on this Court.

Other cases were also cited in support of the applicant's position, which will be found referred to in the judgments of the Court.

Mr. *B. E. O'Conor* (with whom Munshi *Gokul Prasad*) for the opposite party. The analogy of English common law should not be applied in India where there is no common law. Only in cases where the Indian Statute Law is silent, can the English law be applied. The Indian Statute book is not silent upon the question raised by this case. The analogy of the case of Judges does not apply to witnesses. The judges are protected from civil suits (Act No. XVIII of 1850) and from criminal liability (section 197 of the Code of Criminal Procedure). Special Legislation was resorted to in their case. The position of a witness is dealt with by the Indian Evidence Act, section 132, which protects him against a prosecution for a statement which he is compelled to make, after he has objected to make it on the ground that the answer will incriminate him. The giving of this qualified protection is significant. A legal practitioner is, no doubt, not protected by any section, but he is left to look after himself and has so far succeeded in doing so. In order to see how far a witness is privileged, a court should not travel outside the Statute book. If the law as it stands does not protect him, he should be held liable. The exceptions attached to section 499 of the Indian Penal Code are wide enough to protect every body. There may be reasons for amending the Statute, but a Court has no power to

(1) (1872) 11 B. L. R., 321.

disregard it. The accused had no justification in making the statement which he did when he was leaving the witness box. The observations of Lord Bramwell in *Seaman* v. *Netherclift* (1) are important.

Other cases were also referred to, which will be found cited in the judgments of the Court.

RICHARDS, J.—In this case one Ganga Prasad applies for the revision of the conviction under section 500 of the Penal Code and a sentence of fine and imprisonment. It appears that one Birbal was being tried for an offence under section 379 of the Indian Penal Code. Ganga Prasad was called as a witness for the defence, and he thereupon made some remarks of a defamatory nature concerning one Banke Lal. Banke Lal then instituted the present prosecution against Ganga Prasad under section 500 of the Indian Penal Code, and the prosecution resulted, as already stated, in the conviction of Ganga Prasad. It has been contended on behalf of Banke Lal that the words spoken by Ganga Prasad were so irrelevant and foreign to the charge against Birbal that we ought to hold that the words were not spoken by Ganga Prasad in his capacity as a witness at all, and furthermore that some of the words spoken were spoken by Ganga Prasad after he had left the witness box. As to this last allegation, it is by no means clear on the evidence what it was that Ganga Prasad said after he had left the box, and I do not think that it is possible to separate these remarks from the other remarks he made while he was in the witness box. No doubt, under certain circumstances, a Court might hold that the statements of a man made even in the witness box were not made in the capacity of a witness, and in such a case an accused person might be convicted under section 500 of the Indian Penal Code. The Court, however, ought in my opinion to be very slow to find that the statements of a witness made in the course of his examination or cross-examination were not made in his capacity as a witness, and it is quite clear upon the authorities that the strict relevancy of the statements to the matters in issue is not a proper test. In the present case I consider that Ganga Prasad is at least entitled in this criminal prosecution to the benefit of the doubt, and that we

(1) (1876) L. R., 2 C. P. D., 53

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ought to hold that the statements he made were made by him in his capacity of a witness.

The important question remains—Is it sufficient for Ganga Prasad to answer the charge against him by simply saying:—"The words I spoke were spoken by me in my capacity as a witness," or is it necessary for him, upon proof that he spoke the words, to bring himself within one of the exceptions mentioned in section 499 of the Indian Penal Code? Section 499 of the Indian Penal Code provides that "whoever by words either spoken or intended to be read or by signs or by visible representations makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." Then follow ten exceptions. Exception 9 provides as follows:—"It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it or of any other or for the public good." There is no express exception protecting a person making defamatory statements on the sole ground that they were made in the capacity of a witness. Section 79, however, provides that "nothing is an offence which is done by any person *who is justified by law*, or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it." It is argued in support of the conviction that the Code clearly lays down what is defamation, and that unless a person who has defamed another can bring himself under one or more of the exceptions to section 499 he ought to be convicted; that the Court ought not to go outside of the Code, and that if the Legislature had intended to confer absolute privilege on a witness it would have introduced a special exception to section 499. The arguments on the other side are that the Legislature could never have intended to throw the onus on a witness of bringing himself within the exceptions, an onus which in many cases would be most difficult to discharge, and that the opening words of section 79 "justified by law" do in fact provide the exception which is omitted from section 499. It is absolutely clear that in England words spoken by a witness

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are absolutely privileged. This is so clear that it is quite unnecessary to deal with the authorities in detail.

In *Dawkins* v. *Lord Rokeby* (1) the question arose whether this immunity applied to the statements made by a military man in the course of a military inquiry. It was held that it did, and that evidence of the falsehood and malice of the words was immaterial and irrelevant. The House of Lords consulted the Judges and their answer was given by Kelly, C.B.:—"A long series of decisions has settled that no action will lie against a witness for what he says or writes in giving evidence before a Court of Justice. This does not proceed on the ground that the occasion rebuts the *primâ facie* presumption that words disparaging are maliciously written or spoken. If this were all, evidence of express malice would remove this ground. But the principle we apprehend is that public policy requires that witnesses should give their testimony free from any fear of being harassed by an action on an allegation, whether true or false, that they acted from malice. The authorities as regards witnesses in the ordinary Courts of Justice are numerous and uniform." His Lordship then proceeds to give it as the opinion of the Judges that the same principle applies to statements made before a Court of Inquiry.

Lord Cairns says:—"Now, my Lords, adopting the expressions of the learned Judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and of public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended and must be extended to a man who is called before a Court of Inquiry of this kind for the purpose of testifying therein in a matter of military discipline connected with the army."

Lord Penzance says:—"I also agree in the view which has been stated, but I wish to say one word on the supposed hardship of the law which is brought into question by this appeal. It is said that a statement of a fact of a libellous nature which is palpably untrue, known to be untrue by him who made it and

(1) (1875) L. R., 7 H. L., 744.

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dictated by malice, ought to be the subject of a civil remedy though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration free from the defects of human judgment the untruth and malice could be set above and beyond all question of doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which this question of law has to be determined. Whether the statements were in fact untrue and whether they were dictated by malice, are, and always will be open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment, and the real question is whether it is proper on grounds of public policy to remit such questions to the judgment of the jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice and may yet in the eyes of a jury be open to that imputation, or again the witness may be cleared by the jury of the imputation and may yet have to encounter the expenses and distress of harassing litigation. With such possibilities hanging over his head a witness cannot be expected to speak with that free and open mind which the administration of justice requires. These considerations have long since led to the legal doctrine that a witness in the Courts of Law is free from any action."

The decision I have just referred to shows clearly the well recognized state of the law in England. In the case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (1) the question arose as to the liability in India of a witness to be sued for damages in respect of evidence given in the course of a judicial proceeding. At page 328 their Lordships say :—"This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court that if it had been strictly speaking such an action it could not have been maintained; for they agree with that Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country, to

(1) (1872) 11 B. L. R., 321.

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be one based upon principles of public policy. The ground of it is this—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages, but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

It is true that these remarks of their Lordships had reference to a civil suit, but it is abundantly clear that every reason for the protection of a witness against a civil suit for defamation as a consequence of his having given his evidence applies *a fortiori* to protection against a criminal prosecution for defamation, and more especially in this country. Civil suits for defamation in India must, I think, to some extent at least, be based upon the fact that the Penal Code makes the speaking of defamatory words illegal. The very question involved in this application came before the High Court of Calcutta in the case of *Woolfun Bibi* v. *Jesarat Sheikh* (1) and the Court consisting of Mr. Justice Sale and Sir John Stanley, then Mr. Justice Stanley, set aside the conviction, holding that the defamatory statements were made by the accused in the course of their evidence as witnesses in a Court of Justice.

The authorities will be found collected in the report in this case. There is no binding decision of this High Court, although there are some dicta contrary to the view I take to be found in the case of *Abdul Hakim* v. *Tej Chandar Mukerji* (2) and the case of *Isuri Prasad Singh* v. *Umrao Singh* (3). The question is not free from difficulty, but I consider that in principle it is ruled by the decision of the Privy Council in the case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*. It would be simply disastrous to the administration of justice in this country if a prosecution could be instituted against every witness who gave evidence in a court of justice for defamation. In proper cases with the sanction of the Court a prosecution can be instituted against a witness for giving false evidence. It is hardly conceivable that the law which provides for the sanction of the

(1) (1890) I. L. R., 27 Calc., 262 (2) (1881) I. L. R., 3 All., 815.
(3) (1900) I. L. R., 22 All., 234.

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Court being obtained as a condition precedent to the institution of a prosecution against a witness for giving false evidence would permit a prosecution for defamation without any such sanction. I would allow the application.

KNOX, Acting C. J.—The facts found, and the facts which I am prepared to accept, are that the petitioner was witness in the trial of one Birbal for theft. He was cited as a witness for the defence, and when asked what he knew about Birbal's case he replied that he knew nothing. He added that he knew that Birbal had stolen his watch eight years previously, and that he had had to give Rs. 10 to one Banke Lal, whom he pointed out as one of the persons present in Court, before he got the watch back. If Banke Lal's house were searched thousands of rupees worth of stolen property would be found in it.

It is also found that Banke Lal is a respectable zamindar, drug contractor for the Moradabad district, and pays Rs. 400 as income tax.

Banke Lal prosecuted Ganga for defamation. He has been convicted and the sentence confirmed on appeal. He now claims that the words having been spoken by him while in the witness box are absolutely privileged and asks that the conviction and sentence be set aside.

I agree with my learned brother that in the present case we ought to hold that the statements which Ganga Prasad made were made by him in his capacity as a witness, but I regret much that I find myself unable to agree with him that the question which we have to consider is ruled in principle by the decision of the Privy Council in the case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (1).

The decision of their Lordships is entitled to great weight and respect, and had it been given on a matter in issue before them I should have followed it unhesitatingly; but I find that their Lordships themselves say the question did not arise for consideration, and I can find no reference in the judgment to the Penal Code. Moreover, the Indian Evidence Act had not, when this judgment was passed, been consolidated. I am therefore forced to consider the question virtually as *res integra* and in the light of the laws

(1) (1872) 11 B. L. R., 321.

which govern offences and evidence in India at the present time. At the same time I accept the words of their Lordships as giving a complete and accurate account of what the law in England is on the subject.

The original judgment of the Calcutta High Court which was considered by their Lordships in appeal is to be found in 5 W. R., Cr. R, 134, and a perusal of the judgment will make it evident that the question which we have now to consider did not arise in that case.

The suit was a suit for damages on account of the disgrace to which one Gunnesh Dutt alleged he had been exposed by a false prosecution, in which his life and liberty had been put in danger at the instance of Mugneeram and others, who had been put forward by the prosecution as Crown witnesses at the original trial. In the course of their judgment the learned judges stated:—"Witnesses giving evidence judicially cannot be sued in a Civil Court for damages, though they certainly are liable to be punished in a Criminal Court for any false and malicious statement that they may make prejudicial to the character or life or liberty of any person."

Those are very general and safe observations and they leave the conclusion open that a witness is liable to be punished in a Criminal Court for any false (*i.e.*, perjury) and malicious (*i.e.*, defamatory) statement he may make prejudicial to the character, &c., of any person.

In commenting upon this passage their Lordships of the Privy Council observed:—

"This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court, that if it had been strictly speaking such an action, it could not have been maintained, for they agree with that Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognised by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not

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have before their eyes the fear of being harassed by suit for damages; but that the only penalty which they should incur, if they give evidence falsely, should be an indictment for perjury. The precise question now raised did not then arise for decision.

At the time when this trial was held in 1866 the law of evidence in India had not been codified. It has now been codified, and it appears to me that since the Code was enacted, the question is one which has to be decided by the Indian Penal Code and by the Indian Evidence Act of 1872, and not by any maxim, however excellent that maxim may be, which has been universally recognised in England, but has not obtained universal recognition in this country, unless indeed it can be shown beyond room for reasonable doubt that the question was never considered in either Code.

It is true that neither Code in so many words says that a witness is absolutely privileged or is not privileged as to any statement which he may make in the witness box, but the very fact that no direct mention of or indirect allusion to such a privilege is to be found in either Code satisfies me that the Indian Law did not intend to recognize the existence of such a privilege. "*Expressum facit cessare tacitum*" is a maxim that cannot be overlooked in construing Statutes whether English or Indian.

The Indian Penal Code in making defamation a criminal offence was creating an offence which was not till then an offence in India. The caution with which the offence was placed among the offences in the Indian Penal Code is evident from the four explanations and the ten special exceptions or provisoes with which it was limited and circumscribed. There are also the general exceptions contained in Chapter IV of the Code, which, when and where they can be proved to exist, take an act out of the category of offences. It is difficult to conceive that a maxim, which, as their Lordships says, "certainly has been recognized by all the Courts in England to be one based upon principles of public policy," could have been absent from the minds of the framers of the Code, when they were considering this new offence they were creating. They could easily have provided for it had they intended to make it part of the law among the various exceptions contained in the Code. Sections 77 and 79 and the

exceptions to section 499, if I may use the expression, just grazed the point; indeed the latter may from one point of view be said to entirely provide for it, with one exception, and this exception is one created, not by the Indian Penal Code but by the Indian Evidence Act, 1872. The ninth exception is a very wide one, and if good faith might be presumed would cover the case now before us.

The real difficulty in recognizing this privilege appears to me to lie in section 105 of the Indian Evidence Act, which compels a Criminal Court to presume the absence of all circumstances bringing a case within any of the general exceptions in the Indian Penal Code or within any special exception or proviso contained in any other part of the same Code, and lays the burden of proving the existence of such circumstances upon the person accused of the offence. But for this section so heavy a burden of proof would lie upon the prosecution that prosecutions of a witness for defamatory matter would be abortive.

The genesis of section 105 is interesting and seems to me throws some light upon the question now raised. The rule of evidence that prevailed in India on this point when the Indian Penal Code was under consideration is formulated by Mr. Norton in his Law of Evidence applicable to the Courts of the East India Company, 2nd Edn., 1859, section 592, in the following words:—"The technical rule is this; when a Statute in the enacting clause contains an exception and fixes a penalty, then the party seeking to criminate another under that Statute is bound to show that the case does not fall within the exception: but when there is no exception within the enacting clause, but in another distinct and separate clause, or even if it be in the same section, but be not incorporated with the enacting clause by words of reference, the *onus probandi* is shifted. It is not then necessary for the prosecutor to do more than show that the party whom he arraigns has been guilty of the crime in the enacting clause; and it is for the accused to show that the independent exceptive clause takes his case out of the danger of the law."

The Muhammadan Law, which owing to the original constitution of Criminal Courts in India had much influence in such Courts until replaced by Statutes, was much more simple and

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direct, but it was to the same effect. According to it when any special plea was raised by a defendant the *onus probandi* rested upon him (see *Hukeem Wahid Ali Khan* v. *Khan Beebee* (1).

Act No. II of 1855 did not attempt to deal with the burden of proof; but in the Criminal Procedure Code of 1861, which came into force *pari passu* with the Indian Penal Code, it was provided as follows:—

"235. It shall not be necessary to allege in the charge any circumstances for the purpose of showing that the case does not come, nor shall it be necessary to allege that the case does not come, within any of the General Exceptions contained in Chapter IV of the Indian Penal Code, but every charge shall be understood to assume the absence of all such circumstances.

"236. It shall not be necessary at the trial, on the part of the prosecutor, to prove the absence of such circumstances in the first instance; but the accused person shall be entitled to give evidence of the existence of any such circumstances, and evidence in disproof thereof may then be given on behalf of the prosecutor.

"237. When the section referred to in the charge contains an exception, not being one of such General Exceptions, the charge shall not be understood to assume the absence of circumstances constituting such exception so contained in the section, without a distinct denial of the existence of such circumstances."

This was the law for Mofussil Courts; but Act No. XVII of 1862, which was passed to control the procedure for Her Majesty's Supreme Courts of Judicature re-enacted the provisions just cited and made this very important addition (section 27):—

"In proving the existence of circumstances as a defence under the 2nd, 3rd, 5th, 7th, 8th, 9th, or 10th Exception to section 499 of the Indian Penal Code, good faith shall be presumed unless the contrary appear."

Section 27 was not repealed by Act No. I of 1872, nor even by Act No. X of 1875. It continued to be law until Act No. X of 1882 was passed. In the meanwhile Act No. X of 1872 had swept away, so far as Mofussil Courts were concerned, the provisions contained in Sections 235, 236 and 237 of Act No. XXV of 1861, and Act No. X of 1882 made the procedure for the

(1) (1821) 3 S. D. A., Rep., 10 2.

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framing of charges uniform both in High Court and in Criminal Courts subordinate to them. But it is evident that the provision contained the section 105 found little favour at first, especially with the Presidency High Courts.

In enacting section 105 the framers of the Indian Evidence Act appear to have introduced no new law, but to have adopted the principle laid down above.

In any case the Indian Evidence Act of 1872 did not overlook the question of what privileges should be accorded to witnesses. Chapter IX, sections 122—132, and Chapter X, sections 148—152, are examples of this, and if it had been the intention of the Legislature to extend to communications made by witnesses in the witness box the privilege of freedom from being made the subject of a civil or criminal trial, they could and would surely have amplified section 132 of Act No. I of 1872. Can it be possible that prudent men who thought of this privilege should have lost sight of the privilege now under consideration? It seems impossible to answer the question but in the negative. The absence of enactment is to my mind conclusive that they omitted it from the Code of set purpose.

It seems to me then that by introducing such a maxim of English Law as we are asked to do by the learned counsel for the petitioner we should be legislating in such a manner as to modify both the Indian Penal Code and the Indian Evidence Act of 1872, and this I am not prepared to do.

Further, it must not be left out of consideration that the Indian Evidence Act of 1872 was intended to be and is an Act consolidating, defining and amending the Law of Evidence. It is an Act based on the English Law of Evidence modified to suit India. As section 2 of the Act shows, all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India were expressly repealed.

If the rule of evidence now in consideration may be held in consequence of what their Lordships of the Privy Council stated in *Gunnesh Datt* v. *Mugneeram Chowdhry* (1) to have been a rule of evidence which did or ought to prevail in India, it was a rule not contained in any Statute, Act or Regulation in force in

(1) (1872) 11 B L. R., 821.

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1872, and was expressly repealed by section 2 of the Indian Evidence Act. The method, moreover, of construction to be adopted in the case of a Code like this has been pointed out by Lord Herschell in *Bank of England* v. *Vagliano Brothers* (1) and approved by their Lordships of the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2) and also in *Robinson* v. *Canadian Pacific Railway Company* (3), where they add that resort must be had to the pre-existing law in all instances where a Code contains provisions of doubtful import or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a Statutory Code can only be justified upon some such special ground. No such special ground appears to exist in the present case.

The case law, while in favour of the contention raised by the petitioner, still points both ways:—

In 1865 (*Queen* v. *Purseram Das*) (4), the Calcutta High Court were asked by Mr. Doyne to extend the principle of English Law that a defendant in a criminal case is not tongue-tied and may make use of any remark, however defamatory *per se*, with perfect immunity and protection from indictment or action. Kemp and Glover JJ., ruled that the case must be considered as governed by the provisions of the Indian Penal Code. Both learned Judges who heard the case refused to follow the English Law.

In *Scaly* v. *Ram Narain Bose* (5) Glover, J., refused to extend the provisions of section 27 of Act No. XVIII of 1862 to Mofussil Courts.

The authorities relied upon for the opposite view are:—

Baboo Gunnesh Dutt Singh v. *Mugneeram Chowdhry* (6).

Manjuya v. *Seshu Shetti* (7).

Queen-Empress v. *Babuji* (8).

Queen-Empress v. *Bulkrishna Vithal* (9).

Bikumber Singh v. *Becharam Sircar* (10).

(1) L. R., 1891, A. C., 107.
(2) (1895) L. R., 23 I. A., 18.
(3) L. R., 1892, A. C., 481
(4) (1865) 3 W. R., Cr. R., 45.
(5) (1865) 4 W. R., Cr. R., 23.
(6) (1872) 11 B. L. R., 321.
(7) (1888) I. L. R., 11 Mad., 477.
(8) (1892) I. L. R., 17 Bom., 127.
(9) (1893) I. L. R., 17 Bom., 673.
(10) (1888) I. L. R., 15 Calc., 264.

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Woolfun Bibi v. *Jesarat Sheikh* (1), and *Dawan Singh* v. *Mahip Singh* (2).

In all these cases the foundation may be said to be the case of *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*, and I cannot find that in any of them the attention of the learned Judges concerned was drawn to the fact that the observations of their Lordships of the Privy Council were really *obiter dicta*; that their Lordships had abstained from any allusion to the provisions of the Indian Penal Code, and, lastly, to the fact that when that case was decided the Indian Evidence Act had not been modified.

All these considerations appear to me to deprive *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*, of much of the weight the observations contained in it, even though *obiter dicta*, would otherwise undoubtedly have, and in dealing with the cases that follow I shall confine myself to any other considerations which influenced the Judges in extending this maxim of English Law to India.

In *Manjaya* v. *Sesha Shetti* (3) Sir A. Collins, C.J., applied the observations of Cockburn, C.J., in the case of *Seaman* v. *Netherclift* (4), and of Field, J., in *Goffin* v. *Donnelly* (5) as to the rules of public policy which subordinate the interest of the individual to that of a higher interest, *viz.*, public justice, and referred to an earlier case, *Hindi* v. *Bandhy* (6). Shephard, J., relied particularly upon *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (7). The Indian Evidence Act was not at all considered.

In *Queen-Empress* v. *Babaji* again the learned Judges gave no independent reasons for holding as they did. They were content to follow the rulings cited above.

In *Queen-Empress* v. *Balkrishna Vithal*, Telang, J., began by confessing that if the point had been *res integra* he would have been of opinion that the conviction should be affirmed. He continues:—"I am unable to adopt the view that on any correct principles of construction we should limit the meaning of the words of the section of the Indian Penal Code defining defamation so as to exclude therefrom any evidence given by a witness

(1) (1890) I. L. R., 27 Calc., 262.
(2) (1886) I. L. R., 10 All., 425
(3) (1883) I. L. R., 11 Mad., 477
(4) (1876) L. R., 2 C. P. D., 53.
(5) (1881) L. R., 6 Q. B. D., 307.
(6) (1876) I. L. R., 2 Mad., 13.
(7) (1872) 11 B. L. R., 321.

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before a Court of Justice. It is admitted that the words are wide enough to include such evidence, and I do not think that judicial interpretations can properly limit their scope either in view of general considerations about the policy of protecting witnesses from being harassed or of the absence of any prosecutions being hitherto instituted in such cases."

Mr. Justice Fulton, while admitting that is was undoubtedly a serious measure to limit the meaning of words in such a carefully drawn Act as the Indian Penal Code, and one which no Court would attempt unless it were practically certain that the matter to be eliminated was not within the contemplation of the Legislature, came to the conclusion that such certainty did exist.

Now, with all the respect due to such a learned Judge, I am unable to arrive at any such certainty. As I have already pointed out, a Legislature which had taken care to provide against the prosecution of a witness making a statement under compulsion, as is shown in Act No. II of 1855, section 32, and Act No. I of 1872, section 132, was not likely to overlook a maxim so well known and of such importance regarding statements made not under compulsion. It seems to me, on the other hand, from the very provisions set out in the Indian Penal Code that the Legislature did provide, and provide abundantly, for the protection of the honest witness. They considered the case of the dishonest witness and left him unprotected. Nor do I find myself able to attach much weight to the second reason given by Mr. Justice Fulton. If the objection be that no thought of the consequence that might follow should hinder a witness from speaking freely and unreservedly, then why retain the prosecution for perjury? Fully 90 per cent. of the witnesses who give evidence in a Court of Justice are ignorant of, and most of them incapable of appreciating, the different position in which a prosecution for perjury and a prosecution for defamation places them. The interest of public policy can be and would be better guarded otherwise. For instance, the simple addition of the words and figures "section 499" to section 195 of the Code of Criminal Procedure would be one way. Another way would be by the applying of Chapter XXXVIII of the Code of Criminal Procedure. It is too often

forgotten that the complainant in a criminal trial is a witness, and that if he does conduct the prosecution he only does so with the permission of the Court. This point seems to have been overlooked by Mr. Justice Fulton. The same learned Judge argues that the absence of prosecutions in such cases for defamation points to the conclusion that Judges and the public were of opinion that such prosecutions were not intended by section 499. I venture to doubt whether this is a correct view. In these Provinces prosecutions for defamation of any kind are comparatively rare, but the reason lies elsewhere. It is rather to be traced to the unwillingness of men to court a public trial under such circumstances and to the fact that Criminal Courts overburdened with work have no scruples about referring a complainant of such an offence to the Civil Court for his remedy. In this they have been encouraged by the words of Straight, J., in *Empress* v. *Amir Hasan* (1).

In *Bhikumber Singh* v. *Becharam Sircar* (2) the learned Judges simply followed the English law and did not notice Indian law.

In *Woolfun Bibi* v. *Jesarat Sheikh* (3) the Judges merely followed the cases cited and had to deal with the easier case of statements made by witnesses relevant to the issue in the case under inquiry.

There remains the case in this Court—*Dawan Singh* v. *Mahip Singh* (4).

Neither of the Judges who decided the case considered the Indian law bearing upon the point. Even Mr. Justice Mahmood, after holding that the English common law, though it must always be referred to for guidance in questions of difficulty and regarded with respect, is not necessarily fit to be adopted in its integrity, irrespective of the conditions of the country (p. 438), and again that unadvanced countries like India present a state of society where personal insult needs more checks than in more civilized countries like England (p. 445), went on to consider the question of privilege without one allusion to the Indian Penal Code or to the Indian Evidence Act.

(1) Weekly Notes, 1883, p. 167.
(2) (1888) I. L. R., 15 Calc., 264
(3) (1890) I. L. R., 27 Calc., 262.
(4) (1886) I. L. R., 10 All., 425.

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These cases do not remove from my mind the difficulties I have set out earlier in my judgment, and I think the view held by Mr. Justice Young in *Queen-Empress* v. *Gajadhar* is a sounder view to take of the Indian Law upon the point. I am therefore not in favour of granting the prayer of the applicant, as I do not consider he has discharged the burden laid upon him by section 105 of the Indian Evidence Act, 1872. The words used by him regarding Banke Lal were *prima facie* irrelevant to the inquiry and highly defamatory, and the petitioner has not attempted to prove any circumstances which would bring him within any of the special exceptions attached to section 499 of the Indian Penal Code.

Under the provisions of sections 439 (1) and 429 of the Code of Criminal Procedure the case was laid before Aikman, J., who delivered the following opinion:—

AIKMAN, J.—This case has been laid before me under the provisions of section 439 (1) read with section 429 of the Code of Criminal Procedure, the Judges composing the Court of Revision being equally divided in opinion on the question raised by the application for revision. That question is whether a witness can be convicted under section 500 of the Indian Penal Code for the use of defamatory words when giving evidence. This is a question which has given rise to great conflict of opinion in the Courts of this country. A large number of Judges, following the law as it exists in England, have held that witnesses cannot be prosecuted for defamatory statements made by them in giving evidence. In some cases the language used would indicate that in the opinion of the Judges, the immunity of a witness is absolute; in other cases it has been held that the statement of a witness are privileged only if relevant to the issue under inquiry. In many of these cases the learned Judges have put forward in support of their views considerations of public policy as affecting the public and the administration of justice. Such considerations, it seems to me, might well be adduced as arguments to induce the Legislature to amend the law, but when the law of offences has been codified as it has in this country, they are in my judgment entirely out of place in construing the language of the Act. The judges who have held that statements of witnesses are privileged have

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laid great stress on the observations of their Lordships of the Privy Council in the case of *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (1). That case has been considered by the learned Acting Chief Justice in the opinion he has recorded in the present case, and he has given reasons for holding that what their Lordships said in the case cited is not conclusive of the question before us. With these reasons I entirely concur. The argument drawn from section 132 of the Evidence Act, which was not in force when the judgment of the Privy Council was pronounced, appears to me unanswerable. If, as the law then stood, witnesses were protected from any criminal prosecution for statements made in the witness-box, except a prosecution for giving false evidence, what necessity was there for making special provision protecting witnesses from prosecution for anything said in reply to questions which they are compelled to answer? If the law in India was the same as that in England, the proviso to section 132 of the Evidence Act is useless.

But although many Judges in this country, following English law and actuated by considerations of public policy, have held that witnesses cannot be prosecuted for defamation, a still larger number have held that the question must be decided by what the Indian Penal Code says, without regard to the state of the law in England or consideration of what would be desirable in the interests of public policy and the administration of justice, and with that view I agree.

In the case of *Green* v. *Delanney* (2) Phear J., said:—"I think the Judge erred in looking outside the Penal Code itself for the purpose of ascertaining the criminal law of this country with regard to defamation. If the facts which are the subject of a complaint fall within the limits of section 499, construed, as the section ought to be, according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then in my judgment they amount to defamation, quite irrespective of what may be the English law on the subject." In this view Jackson, J., fully concurred.

In the case *Queen-Empress* v. *Balkrishna Vithal* (3) it was held, following previous rulings, that a witness cannot be

(1) (1872) 11 B. L. R., 321, at page 329. (2) (1870) 14 W. R., Cr. R., 27.
(3) (1893) I. L. R., 17 Bom., 573.

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prosecuted for defamation on account of statements made when giving evidence in the witness-box; Telang, J., said:—"I confess, if the point which arises in this case had been *res integra*, I should have been of opinion that the conviction should be affirmed. I am unable to adopt the view that on any correct principles of construction we should limit the meaning of the words of the section of the Indian Penal Code defining defamation so as to exclude therefrom any evidence given by a witness before a Court of Justice. It is admitted that the words are wide enough to include such evidence and I do not think that judicial interpretation can properly limit their scope either in view of general considerations about the policy of protecting witnesses from being harassed or of the absence of any prosecutions being hitherto instituted in such cases."

In the case *In re Nagarji Trikamji* (1) Jardine and Farran, JJ., referring to the above case, said that they were inclined to share the doubts expressed by Telang, J., and in regard to the liability of witnesses to be prosecuted for defamation observed:—"It would, however, in our opinion be beyond the province of mere interpretation to engraft a new exception on the definition. The Legislature has enacted a general exception in favour of Judges, to wit, section 77 of the Penal Code, and in section 132 of the Evidence Act has gone a certain length in protecting witnesses against the Criminal law; it may be assumed that it had no intention of going further."

In the case *Angada Ram Shaha* v. *Nemai Chand Shaha* (2) Petheram, C.J., and Rampini, J., said that they were bound by the earlier decisions of their Court, and added:—"if there had been no authority on the point in this Court, we should have come to the same conclusion." In regard to the particular question before them, *i.e.*, whether a statement made in the pleadings of an action was absolutely privileged in accordance with the rule of English law, they say:—"if it is defamation, nothing but one or other of the reasons mentioned in the exceptions can prevent the publication from being criminal."

In the case *Abdul Hakim* v. *Tej Chandar Mukarji* (3), the head-note, which correctly represents the sense of the judgment, is

(1) (1894) I. L. R., 19 Bom., 340. (2) (1896) I. L. R., 23 Calc., 867.
(3) (1881) I. L. R., 3 All., 815.

as follows:—"The law of defamation which should be applied in suits in India for defamation is that laid down in the Indian Penal Code, and not the English law of libel and slander." In their judgment, the learned Judges (Straight and Tyrrell, JJ.) say:—"It seems to us that when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which determination of suits like the present should be regulated."

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As pointed out by the learned Acting Chief Justice, the language of the Indian Penal Code was not considered in the Privy Council judgment in the case reported in 11 B. L. R., 321. Had it been considered, there can, I think, be little doubt that their Lordships would not have departed from the principles laid down by Lord Herschell in the *Bank of England* v. *Vagliano* (1) and approved of by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (2). These are the principles which in my opinion should guide us in the present case. The applicant Ganga Prasad, in giving evidence used language in regard to the complainant Banke Lal, which clearly amounts to defamation as defined by section 499 of the Penal Code, and he has not brought himself within any of the exceptions set forth in the Code. He therefore committed the offence made punishable by section 500 of the Code.

In my opinion, therefore, he was rightly convicted. I was addressed by applicant's learned counsel on the third plea set forth in the application, namely, that the sentence is excessive. I think, that, having regard to the circumstances of the case, this plea has force. The applicant, who has undergone the greater part of the term of imprisonment imposed on him, has been released on bail. I would reduce the term of imprisonment to that already undergone by him. I would also reduce the fine to Rs. 250.

In accordance with the above opinion the sentence of imprisonment passed on the applicant Ganga Prasad is reduced to the term already undergone. The fine is also reduced to Rs. 250. Any excess paid by the applicant must be refunded. The bail on which he was released is discharged.

(1) L. R., 1891, A. C., 107. (2) (1895) L. R., 23 I. A., 18, at p. 26.

PRIVY COUNCIL.

P. C.
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February 19
June 20

MUHAMMAD MUMTAZ ALI KHAN (PLAINTIFF) *v.* MURAD BAKHSH (DEFENDANT) AND 5 OTHER APPEALS BY THE SAME APPELLANT CONSOLIDATED AND MUHAMMAD MUMTAZ ALI KHAN (PLAINTIFF) *v.* MUHAMMAD MOHSIN (DEFENDANT) AND ANOTHER APPEAL BY THE SAME APPELLANT CONSOLIDATED.

[On appeal from the Court of the Judicial Commissioners of Oudh, Lucknow.]

Act No. 1 *of* 1869 (*Oudh Estates Act*)—*Birt zamindari rights*—*Rights of persons holding under-proprietary rights in villages under taluqdar before annexation of Oudh*—*Policy of Government under Record of Rights Circular No.* 2 *of* 1861—*Heritable and transferable rights.*

The defendants, either by themselves or their predecessors in title, had from before the annexation of Oudh, held under-proprietary rights (known as birt or birt zamindari rights) in villages in the taluqa of which the plaintiff was the taluqdar. In the Record of Rights Circular No. 2 of 1861 the policy of the Government was declared "that the birtias who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pattas under the taluqdars must be maintained in the full enjoyment of their rights in subordination to the taluqdars." In suits by the taluqdar to recover the villages,

Held on the evidence and under the circumstances of the case, that the defendants had shown themselves to come within the benefit of the policy declared in the above circular, and had therefore acquired, upon the annexation of Oudh by the British Government, heritable and transferable rights as against the plaintiff in the villages in suit.

1. SIX consolidated appeals (81, 87, 92, 96, 97 and 101 of 1903) from decrees of the Court of the Judicial Commissioners of Oudh in some cases reversing and in others affirming decrees of the Court of the Additional Civil Judge of Lucknow.

2. Two consolidated appeals (84 and 86 of 1903) from decrees (16th November 1899) of the Court of the Judicial Commissioners of Oudh, which affirmed decrees (20th April 1897, and 23rd November 1896 respectively) of the Court of the Additional Civil Judge of Lucknow.

All the above appeals arose out of suits for the possession of various villages situated in the Gonda District of Oudh, and in all of them the appellant was the taluqdar of the taluqa of Bilaspur in Oudh now known as the taluqdar of Atraula; and all the villages in suit were situated in the said taluqa. At the second

Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

summary settlement of Oudh the said taluqa was settled with Raja Umrao Ali Khan, grandfather of the appellant, who died in or about 1860 and was succeeded by his son Raja Ria-at Ali Khan. The latter died in 1865, being succeeded by his posthumous son the appellant, who was then a minor, and his estate was placed under the management of the Court of Wards until 6th October 1886, when the appellant attained his majority. During this period the regular settlement of the Gonda District was made. A large number of persons, including the respondents or their predecessors in title, claimed under-proprietary rights against the taluqdar, and most of these claims were admitted. Judgments of their Lordships of the Judicial Committee have already established that some of these claims were fraudulently admitted by agents of the Court of Wards. Decrees of the Settlement Court were made in favour of the claimants in accordance with the admissions.

On attaining his majority the appellant instituted (amongst many others) the suits out of which the present appeals arose. The plaint in each case set out the title of the appellant to the village sued for and stated the date when he attained majority and that his estate was then released from the management of the Court of Wards. It asserted that the decrees made at the time of the regular settlement were not binding on the appellant because he was not properly made a party thereto; because the agents of the Court of Wards were not authorized to admit the claims; and because the admissions of the claims were fraudulently and collusively made. The plaint also alleged that, independently of the decrees made on those admissions, the respondents were not entitled to any under-proprietary rights. The relief sought was the recovery of possession of the villages from the respondents.

The only ground raised in these appeals material to this report was whether the respondents had under-proprietary rights in the villages in suit.

Appeal 87 of 1903. The village in dispute in this case was Dhurahra. The defence was that the defendants held under-proprietary rights under two grants made by Raja Omrao Ali Khan on 21st September 1848 and 25th January 1850, and that the decree made at the regular settlement was binding on the

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appellant. The grant dated 21st September 1848 was in the following terms:—

"I, Sri Khan-i-Azum Masnad-i-Ali Maharaj Raja Omrao Ali Khan, have executed a birt zamindari in favour of Fakir Bakhsh Mahton, in respect of village Dhumbra, a nankar estate, in tappa Bahrampur of Pargana Atrsula in the Sarkar of Bahraich, and made over to him sajal, s'kat, sapat in chatur siwan (*i.e.* the rights in water, wood and road within its four boundaries). He is to take possession and occupation of the village with (perfect) composure of mind, and to pay the Government due. He is to take one-fourth share of the Government revenue as right of birt zamindari. The area of the village is fifteen hundred kham (village) bighas."

The grant dated 25th January 1850 was in the same terms without any reference to the previous grant. On 28th June 1871 at the regular settlement Raja Chaudhri, the original respondent in this appeal, claimed a decree for under-proprietary right in the said village, and on 8th July 1872, his claim being admitted, a decree was made on that admission.

In the present suit the Additional Civil Judge of Lucknow delivered judgment on 3rd May 1897, holding that the appellant was not properly a party to the suit at the regular settlement; that the admission was not made by any person duly authorized to make it; and that the decree of 8th July 1872 was not binding on the appellant. He also held that the defendants did not hold under-proprietary rights in the village. In the absence of proof of the date on which the appellant was born he considered that the suit was barred by limitation, and in consequence made a decree dismissing the suit with costs.

On appeal to the Court of the Judicial Commissioners of Oudh judgment was delivered by that Court (G. T. SPANKIE and W. BLENNERHASSETT) on 19th December 1899. In the course of the appeal the date given by the appellant as the date of his birth was admitted, and the question of limitation was thus settled in the appellant's favour.

The Judicial Commissioners held that as the appellant had not produced the papers given over to him by the Court of Wards, a presumption arose that Salig Ram, the manager of the estate, was duly authorized to confess judgment at the settlement. They also held that the respondents were birtdars and that 'a person holding a birt or birt zamindari tenure under which he receives one-fourth or one-tenth of the profits of the village, has

a heritable and transferable share in that share.' On these findings a decree was made affirming the decree of the Additional Judge.

Appeal 92 of 1903. In this case the village in dispute was Pachauta. The terms of the grant dated 4th May 1830 to Makdum Bakhsh Khan by Raja Muhammad Khan, were similar to those of the grants referred to in appeal 87 of 1903. The proceedings at the regular settlement were also the same, a decree being passed on admission of the claim in favour of Ali Bakhsh Khan, the son of Makdum Bakhsh Khan on 8th July 1872. The pleadings and the decisions of the Additional Judge and Judicial Commissioners (the latter dated 19th December 1899) were also similar to those in the case of appeal 87.

Appeal 96 of 1903. The village sued for in this case was Tatarpur. At the regular settlement a claim was advanced on behalf of the appellant to the superior proprietary right and on 8th February 1872 this was decreed to him. On the same date the claims of Ishri Prasad and Sukhmangal Singh (with whom the second summary settlement had been made in 1859) to the superior proprietary right were dismissed. They were, however, granted sub-proprietary rights in the village on payment of the Government demand plus 15 per cent. and half the cesses and village expenses. In this suit, in addition to the defences raised in the other suits, it was pleaded that the appellant had no title to the village, and that his suit was barred by limitation. The Additional Civil Judge gave judgment on 3rd May 1897. He followed his previous judgments on the matters then decided, and further held that the appellant had no title except under the decree which he impeached, and that the cause of action having arisen in 1859 during the life time of Raja Riasat Ali Khan, the suit was for this reason barred by limitation. He accordingly dismissed it with costs. On appeal the Judicial Commissioners on 19th December 1899 affirmed that decree holding that the suit was barred; that the appellant was bound by the decree passed at the regular settlement, and that on the merits the respondents as birtias had a heritable and transferable right in the village in suit.

Appeal 97 of 1903. In this case the village in suit was named Gaur. Both the summary settlements were made with

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the appellant at the regular settlement on 23rd February 1871 Arjungir Gosháin claimed the under-proprietary right in the village, and a decree was made in his favour on 2nd September 1872. In this suit the defence was the same as in appeal 87 of 1903 except that no question of limitation was raised. The Additional Judge on 19th January 1898 made a decree in favour of the appellant; but on 19th December the Judicial Commissioners reversed that decree and dismissed the suit with costs.

Appeal 101 of 1903. The subject-matter in this case was a village called Chatarpura. There was no birt patta. The second summary settlement was made with the appellant. At the regular settlement on 22nd June 1871 Subhan Chaudhri claimed an under-proprietary decree as birtdar. On admission a decree was made in his favour on 27th April 1872. The pleadings and issues were the same as in appeal 87 of 1903 with the exception of two matters, namely, that the appellant's case ought to be confined to a share in the village, and that he was estopped from suing by his receipt of rent. The Additional Civil Judge on 24th June 1897 limited the appellant's case to a 14-anna share in the village, and in accordance with his judgment in appeal 97 of 1903 made a decree in the appellant's favour. On appeal the Judicial Commissioners on 19th December 1899 reversed that decree and dismissed the suit on the grounds already stated in the other cases, and also on the ground that the appellant had by the receipt of rents after attaining majority elected to treat the decree of the Settlement Court as valid.

Appeal 81 of 1903. The village in dispute was named Kusabwa. The birt patta was granted by Raja Omrao Ali Khan. In other respects the case was similar to appeal 101 of 1903. At the regular settlement the decree was on 5th August 1872 made in favour of Subhan Chaudhri. In this suit the Additional Civil Judge (not the same Judge that decided the other cases) on 4th January 1897 held that the cause of action accrued during the life time of Raja Riasat Ali Khan and the suit was therefore barred by limitation; that the appellant was duly represented in the litigation and bound by the decree made at the regular settlement, and that the appellant had satisfied the decree by the acceptance of rent. He therefore dismissed the suit. On appeal the Judicial

Commissioners (ROSS SCOTT and G. T. SPANKIE) affirmed the decree for the same reasons as in the other cases.

In the other two consolidated appeals (84 and 86 of 1903) the questions raised related to the right of the appellant to recover possession of the villages in suit, or to receive a larger proportion of the profits from the respondents.

Appeal 84 of 1903. The village in suit in this case was called Belha. After the annexation of Oudh the first and second summary settlements of the village were made with the respondents or their predecessors in title. At the regular settlement, on 11th June 1871 a claim to the superior proprietary right was advanced on behalf of the appellant against the predecessor in title of the respondents. On 15th July 1872 the Assistant Settlement Officer recorded that the appellant "only present by Thakur Prasad, says we now limit our claim to 10 per cent. malikana. Defendant is a birtia who bought from Kale Khan. Kale Khan got birt from Raja Muhammad Khan . . . claim to superior title dismissed and a malikana of 10 per cent. on revenue decreed."

In the suit in this case it was contended that the appellant was not properly a party to the decree, and was not bound by it, and that the respondents' rights, if any, were limited by the terms of the grant to them. The relief sought for was possession, or failing that, a declaration of the respondents' rights under the terms of the grant. The defence was that the village in suit was not part of the appellants' taluqa; that the decree of 15th July 1872 was binding; that the suit was not maintainable, and was barred by limitation. It was also contended that the appellant was estopped from advancing his claim owing to the receipt by him of the malikana dues after attaining majority. The Additional Judge on 20th April 1897 held that the village was not a portion of the appellants' taluqa; that the suit was barred by limitation; that the respondents' ancestors possessed the rights of birt holders prior to and irrespective of the decree of 15th July 1872, and were in possession of the village in suit prior to both the summary settlements. He consequently dismissed the suit. The Judicial Commissioners, G. T. SPANKIE and W. BLENNERHASSETT, on 16th November 1899 affirmed that decree on the sole ground that the settlement decrees were binding, on which

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question they said that the suits having been properly instituted on behalf of the plaintiff and not having been disposed of by consent, and there being no evidence of any gross neglect or mismanagement the decrees passed in these suits cannot be set aside. . . . It is not necessary to express an opinion on the merits, but were it necessary we should have no difficulty in finding that the defendants have held direct under native rule and after annexation, and that the plaintiff has no title against them."

Appeal 86 of 1903. This case related to the village of Badalpur Chaukhandia. It was a similar case to that of appeal 84 of 1903 and the pleadings were of the same nature. The claim at the regular settlement was made on 6th January 1871 on behalf of the appellant by one Thakur Prasad and a decree similar to that in appeal 84 was made on 1st June 1872 dismissing the claim to the superior title, but decreeing 10 per cent. on Government revenue as malikana. The Additional Civil Judge held that the suit was barred by limitation, and that having received malikana dues after attaining majority, the appellant could not impugn the decree of the Settlement Court. He made a decree dismissing the suit. On appeal that decree was affirmed on 16th November 1899 by the Judicial Commissioners (G. T. SPANKIE and W. BLENNERHASSETT) for the same reasons as in appeal 84 of 1903.

The following portion of the judgment of the Court of the Judicial Commissioners of Oudh in appeal 87 of 1903 is material as showing the grounds for their conclusions that the respondents in each appeal must be held to have an under-proprietary tenure in the respective villages in suit. These conclusions and the reasons on which they were based were accepted as correct by their Lordships of the Judicial Committee:—

"The grant is not an isolated or anomalous grant. It is one made in pursuance of a widespread custom. Similar grants are common in the Districts of Gorakhpur, Basti, Gonda, and Bahraich, and probably other submontane tracts, where large areas of jungle had not been brought under cultivation. Probably the best description of them extant is to be found in the Gonda Settlement Report.

"The author of the Gonda Settlement Report, after explaining the original structure of the Hindu society in its simplest form

as consisting of Raja and cultivator in the north of the district and its more complex form in the centre of the district, owing to the intervention in the majority of villages, of bodies of hereditary *birtias* between the Raja and the cultivator, proceeds in para. 64 to explain the relationship between the Raja and *birtias*. In para. 72 he states that waste lands were at the Raja's disposal. 'He might cede them on favourable terms to single speculators, who engaged to bring them under cultivation by introducing ploughs themselves. Having once dealt with them he was bound by rules, which rules will be described when the division of the grain-heap and the position of the *birtias* are considered.' After detailing the deductions from the grain-heap, the author proceeds:—'What is left is divided into two equal heaps, one for the Raja and the other for the cultivator; in local language the Raja's heap is known as the *hissa sirkari*.' And in para. 38 'this or something essentially similar in principle is the method in use all over the district for land in full cultivation and paying rents in kind. The produce is the common property of every class in the agricultural community, from the Raja to the slave. No one is absolute owner any more than the others, but each has his definite and permanent interest,' (para. 34) 'the basis of the whole society being the grain-heap, in which each constituent rank had its definite interest. There is as yet no trace of private property, whether individual or communal, the rights which bear the nearest resemblance to it being the essentially state rights of the Raja. Independently of the fact that it is still in many places in actual existence, its importance to the administrator lies in its being the original type from which all the different forms of landed property have been divided by processes which may be easily traced, and whose operation is in most cases going on under our eyes. Its original form is modified by the growth of two institutions within itself, the *birtia* and the village zamindar; and by the operation of two external causes—the introduction of money into the relations between its various members and the encroachment of a foreign power on the prerogative of the Raja.'

"'*Para.* 85.—*Birt* means a cession of any part of the Raja's rights within definite limits.'

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"'*Para.* 86.—The most important classes of *birt* were of two kinds, the *birt zamindari* and the *birt jangal tarashi*. Of the first kind I know no instance more than two hundred years old, and by far the greater number were created within the present century when the Raja granting them was out of possession of the lands to which they referred. So complete is the cession that it is not likely that the comparatively small gratuity, which formed the consideration, would have reconciled the Raja to the loss of his rights, had he been in actual fruition of them. So their existence may really be traced to the operation of the external forces just mentioned. They are most common in Utraula, Sadullanagar and Burhapara where the Raja had been longest and most completely set aside, and in those parganas there is hardly a village where they do not constitute the charter of the present proprietary family. Their terms, which varied very slightly, were as follows:—

"'The Raja cedes a certain plot of land or a village to a certain grantee. He abandons all rights in water, in wood, and in roads; the *birtia* on his part is bound to plough and bring in ploughs, and inhabitants are liable for the cash assessed by the *nazim* or *chakledar* of the village. In the event of a grain division (as described above) the right of the *birtia* extends to one-fourth of the Raja's heap.

"'87. In Gonda, Mankapur and Bamhanipair, *birts* are equally common, but on less favourable terms. The Rajas there still retained considerable power, and in Gonda at least must have entertained strong hopes of recovering the whole. The *birtias* consequently were very seldom invested with the peculiarly *zamindari* attributes of manorial rights or transit dues; and their zeal in clearing the *jungle* was stimulated only by the perpetual cession in favour of themselves and their posterity of the old *mukaddam's* deduction of one-tenth from the Raja's grain-heap.'

"The treatment of the zamindar by the Muhammadan government is explained in paras. 91 and 92. 'The *dehi nankar* allowed by that government, usually bore, in the first instance some definite proportion to the gross assets. In Utraula, for instance, the rights of the *birtias* were respected, and they were allowed, as

they would have been under the Raja, one-fourth of the state assets. This they continued to receive whenever the Government collections were made in grain. It was the general introduction of cash payments for whole villages that modified their position in this respect.'

"'*Para* 97.—It has been seen that in the original form of the society money did not enter at all into the relations which subsisted between the purely agricultural classes, nor does it now in the north of the district, except in the case of such crops as sugarcane and poppy, whose division is effected with difficulty, and which occupy an infinitesimal proportion of the whole area. It is only in the rich old cultivation between the Terhi and the Ghagra that money-rents have been at all prevalent for a long time. Between the Terhi and the Kawana they are of recent and still partial introduction. They have, however, been for some time in use everywhere, where the *nazims* collected direct in the lump assessments on whole villages. They were recommended here by their obvious convenience, as it would have been an utter impossibility for any *nazim* to superintend the grain divisions in every village in his charge. The result of their introduction was that the revenue ceased to bear a fixed proportion to the total produce . . . . . As the revenue ceased to bear a fixed proportion to the produce, so did the *nankar* of the village proprietors, originally a stated share of the revenue, cease to fluctuate also. The same sum as had been originally assessed as their share continued to be remitted in their favour, whatever the lump assessment on the whole village might be.'

"'*Para*. 102.—The general introduction of money payments had converted *zamindari* receipts from the land into something bearing resemblance to rent, and had undermined the fixity of tenure which was secured under the old system of payments in kind.'

"Para. 59 of the Basti Settlement Report shows the form of *birt-patr* prevalent in that district. It is very similar to the form in use in Gonda. The Raja surrenders water, wood and roads or transit dues within the four boundaries of the village. In the entire *birt*, half is declared to be revenue-free and half to be the right of Government.

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"From paragraph 52 it appears that the settlement was made with the *birtias*, an allowance of 10 per cent. being payable to the over-proprietors.

"In paragraph 59 the Settlement Officer states:—'With the exception of Bansi, therefore, in every pargana there is, or was, a landed aristocracy in regular gradation. At its head was the Raja in possession of whatever portion of the original domain had escaped alienation; next his more or less distant cousins and the members of his clan generally with their separate estates, and after them the great body of *birtias*. *Birt* means the grant of a right in land by the original lord of the soil . . . . . The *birt* grants sometimes conveyed a full proprietary right, sometimes only a limited and temporary interest in the village . . . . Land was at first of little value and rights in large tracts were made over for a nominal consideration or given away without any consideration at all. . . . . But the common and ordinary form of *birt* merely conferred a limited and subordinate right. The *birtia* had the entire control of the village, but he was only allowed to retain a definite proportion of the profits, most commonly one-tenth or one-fourth, and was obliged to hand over the rest to the superior proprietor. In such cases the right, though limited, was complete as far as it went. If the Raja, as he sometimes did, resumed the control of the village, he allowed the *birtia* to retain a one-fourth or one-tenth of the land, as the case might be, instead of his general *birt* right. I have come across several *arazi* holdings which arose in this way. All the different classes of *birtias*, as well as most of the *mukaddams* or managing lessees, have been treated as zamindars since 1839, and the settlement has been made with them in full proprietary right, subject in some cases to the payment of a *malikana* allowance of 10 per cent. to the superior proprietor.

"Paragraph 194 of the Gorakhpur Settlement Report contains extracts from the *Gazetteer* and a form of modern *birt*, merely stating that the village is assigned in *birt* and the *birtia* is to pay the rates payable by *birtias* in general. The terms are not nearly as precise as in the deeds in use in Gonda and Basti.

"Paragraph 194 proceeds:—'The nature and rights of a tenure so common in the district formed the subject of long inquiries

and deliberations at each recurring revision of assessment. The chief point was to ascertain whether the *birt*-holders (*birtia* or *birthia*) were or were not proprietors entitled to engage for the revenue. The Government at first took the negative view and directed settlements with the Rajas and Taluqdars; but in 1835 the Board changed its mind. On the report of the Collector, Mr. Armstrong, it held that the tenure was heritable and transferable, and that the *birtias* must be considered as proprietors of the villages held by them. Settlement has ever since been made with the *birtias* themselves, who have thereby become independent of their feudal chieftains. But they must still pay into the Government treasury, to be credited to those chieftains, a seigniorial fee (*malikana*) of Rs. 10 per cent. on their revenue.'

"An opinion is expressed that *mukaddam birts* carrying an allowance of one-tenth of the assets were merely granted during the pleasure of the grantor. Paragraph 196 contains a further extract from the *Gazetteer* to the effect that the *mukaddam* tenure is to all effect a *zamindari*. Paragraph 197 states that at the cession of the district to the English Government a vast majority of the land was either revenue free or waste land belonging to Government, and although the rajas and grantees owned all the cultivated land paying revenue, yet the cultivation was arranged for either through the agency of *birtias* or *mukaddams*.

"'The *birtias* held or claimed to have their lands under written grants acquired from the rajas by gift or by a form of purchase. To show that *birt* often was a recognised mode of acquiring land with sale and mortgage, an instance is unearthed from the records of 1817, where the Rani of Satasi offers to sell 19,000 bighas culturable land outright at Rs. 2 per bigha or to give it in *birt* at Re. 1 per bigha and subject to an annual payment of one-fourth of the produce. The duties of *birtias* are defined to be to clear and cultivate the land and to make certain annual payment known as *malikana*. At the time of the cession of Gorakhpur to the British most of the revenue-paying land was in the hands of *birtias*. The whole of paragana Maghar, the Bansgaon tahsil, as well as the greater part of Salempur Majhauli were then the property of *birtias*.'

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"In paragraph 193, the author, having disposed of *birtia* communities with acknowledged rights, proceeded to the *mukaddam* class of *birt*. He considered that this tenure was originally of a non-proprietary character. After some oscillations of policy the *mukaddams* were acknowledged by Government as the subordinate proprietors and engagements were taken from them.

"The Bahraich Settlement Report referred to at pages 176—179 of Sykes' Compendium contains a specimen form of *birt* deed in force in Bahraich. It contains a provision that the *birtia* is to get continuously the *zamindari* dues, whether the village is held direct or *kham*. The talukdar consented to a sub-settlement decree being passed on that document. The Settlement Officer described the *birt*, as consisting in the sale of the right to settle on a certain plot of waste, and to enjoy all such valuable perquisites as would necessarily result from that occupation. The Settlement Officer only knew of one instance in the Bahraich district in which the *birtia* had obtained one-tenth of the gross produce of the village. He considered that the right of management was expressly reserved to the grantor at his option by the terms of the deed.

"It will be apparent from the above quotations, that a *birt* grant was usually made by a person in the position of a Hindu Raja or Governor in submontanic districts, as an act of state, for the purpose of bringing waste lands under cultivation. The grants are analogous to grants made by the British Government under the waste land rules. The necessities of the case demand fixity of tenure. It is inconceivable that any reasonable man would pay large sums of money, and spend his labour and capital, in reclaiming jungle, if his position were no better than that of a tenant at will. A small minority of Revenue officials was of opinion that the raja had a right to resume such grants. It was admitted, however, that force was the prevailing element. MacAndrew's 'Some Revenue Matters,' page 26.

"That was not the view held by the majority of Revenue officials, or by the Government, or by the Legislature, and indeed the question of resumption was nothing more than a question as to which of two partners should be the managing partner.

It is indisputable that on resumption the *birtia* would still take his one-quarter share of the raja's grain-heap. The only difference would be that the raja would arrange for the cultivation of the village instead of the *birtia*. The quotations from the Basti and Gonda Settlement Reports establish this. This is in pursuance of an ancient and invariable custom, prevailing all over the north of India, by which a proprietor who is excluded from the management of the village invariably retains his *sir*, or *nankar* or specified share of the income.

"In the present case, there is a strong corroboration of this. On the *birtia* refusing to pay the sum of rent of Rs. 500 claimed by the raja, Umrao Ali Khan, grandfather of Raja Mumtaz Ali Khan, at once conceded the *birtia's* right to receive an annual payment of Rs. 125, during the time of his exclusion from the management. These deeds, therefore, indisputably convey a right in perpetuity, to the particular share of produce specified therein.

"In the Districts of Gorakhpur, Basti, Gonda, and even in Bahraich, notwithstanding the peculiar stipulation in the deeds there current, they have been held to also convey in perpetuity the right to the management of the village. Whole parganas, and whole tracts of country in those districts, are to this day held in proprietary and under-proprietary right under these deeds. I may note here an error into which the Court below appears to have fallen. The deeds do not purport to be *pattas* or leases. They are correctly described as *birt-patrs* or deeds of cession. There can be no doubt that in general the resumption of such tenure was an act of might rather than of right. That is the opinion to which the Government and the Courts have come, after long experience over large tracts of country. I have no doubt that that conclusion is a just and true conclusion, and that it is in accordance with the law and customs of the people.

"I hold, therefore, that a person holding a *birt* or *birt-zamindari* tenure under which he receives one-fourth or one-tenth of the profits of the village has a heritable and transferable right in that share, whether excluded from the village management or not. There is in general a presumption that he is also entitled to retain in perpetuity possession and management of the

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village, though this presumption may be rebutted by the terms of the grant.

"For the Raja, Mr. *Lincoln* contends that unless the *birt-patr* contains terms giving a proprietary right in perpetuity, the defendants have not established their case. That, no doubt, is a doctrine of the English law. I do not think that it is applicable to the present case. I do not think it is possible to apply the ideas prevailing in the mind of an English conveyancer to the construction of a document drawn up in the form used by Hindu conveyancers. In the case of *Bal Kishan Das* v. *Legge* (1) now in appeal before Her Majesty in Council difficulties of applying the rule of English law to documents drawn up in the Mahomedan form of conveyancing are apparent. Raja Muhammad Khan was no doubt a Mahomedan. He, however, held the Hindu office of raja. His grant is in the ancient Hindu form couched in terms borrowed from the Sanskrit language. In my opinion the document should under the rule of justice, equity and good conscience be construed in accordance with the ideas prevailing among Hindus In Select Case No. 291, Dr. Howell has discussed at some length the presumptions arising in such case. As regards presumptions arising from a grant by a Hindu he holds that, subject to certain limitations, the presumption is that the grant is in perpetuity. In selections from Oudh Government Records (Groves), page 40, the kanungoes and zamindars of the Hardoi district expressed their opinion to the Settlement Officer that a tenant holding a grove might plant new trees in the place of old trees on the principle that what has been given has been given, that is to say, there is a presumption in favour of perpetuity. I hold that a gift of lands made by a *birt-patr* not containing express words of inheritance is presumed to carry an estate of inheritance.

"For the Raja, Mr. *Lincoln* concedes that if their Lordships of the Privy Council with complete evidence before them, adopt the same view that they adopted in the case of *Muhammad Mumtaz Ali Khan* v. *Sheoratangir* (2) with limited evidence before them, then it will follow that a very large number of

(1) (1897) I. L. R., 19 All., 434. (2) (1906) L. R., 23 I. A., 75 (83) : I. L. R., 28 Calc., 934, 940.

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cases decided by the Settlement Courts in Gonda must have been decided on an erroneous principle. Mr. *Lincoln's* argument comes to this: that officers who were appointed for the sole purpose of studying the history and the institutions of the people in order that they might be able to correctly decide their legal rights, and who spent years on the spot in close contact with the people in performing this duty, with the conspicuous ability displayed in the Gonda Settlement Report must have entirely failed to arrive at the truth. I should be unwilling to arrive at such a conclusion. Mr. *Lincoln's* argument, however, goes further than this. He not only says that the managing and collecting tenure of the whole village cannot have been in perpetuity; but he says that if the raja resumed the village, the *birtias* would not even be entitled to retain their right to receive from the raja one-quarter of the profits, notwithstanding that they might have expended large capital in reclaiming the village from jungle. Mr. *Lincoln*, therefore, calling in aid doctrines borrowed from the law of England, is compelled to place himself in opposition, not only to the opinions formed by the Government and the Courts in every district in which the *birt* tenure is known to exist, but also in opposition to the ancient custom of the country acknowledged by his client's grandfather in the case of Pachautha in 1861. I cannot accept his views.

"The argument that acceptance by the *birtia* of leases for a short term is inconsistent with a permanent grant appears to me to be untenable. It is only in recent years that corn rents have been converted into cash rents. The process is not yet complete in Gonda. Under corn rents, leases would not be necessary. Under cash rents, however, reassessments are necessary after certain periods. These leases for a term were merely intended to assess the cash rents for a few years, in lieu of corn rents without in any way infringing on the *birtia's* permanent right to one-quarter of the rents and profits, which right is distinctly reserved to him by those very leases. Nearly all proprietors and under-proprietors in these Provinces are subject to pay re-assessment at the close of settlement. By signing an agreement to pay a fixed amount for 30 years they do not forfeit their permanent interests in their estate. Section 68, clause (2) of the

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Oudh Rent Act, lays down that a person having certain rights in land does not lose them by subsequently taking a *theka* or mortgage in which his holding is comprised. In my opinion these leases are not inconsistent with a right in perpetuity vested in the *birtia*. The same view has been held in *Ram Bharos* v. *Lal Achal Ram* (1) following a decision of this Court in *Gurcharan Bhudi* v. *Shambhudatt Ram* (2).

"The learned Counsel for the Raja strongly contended that the present case was on all fours with that of *Ram Autar* v. *Muhammad Mumtaz Ali* (3). It is seldom profitable to attempt a close comparison of the facts of different cases. In the present case the proposed comparison appears to be more than usually unprofitable. In that case, Salig Ram, who confessed judgment, was an interested person. In this case it is not shown that he was personally interested. In that case the *munji* statement was not supported by the evidence of the raja and the patwari and the other persons. In the present case grants have been produced. The purport of them has been fully explained by reference to works of great authority on the subject. The nature of the grant in that case appears to have been uncertain. In the present case the grant is one of *zamindari birt*. The evidence in that case was somewhat defective. In the present case some of those defects have been made good. In the present case the statement of Raja Umrao Ali Khan has been produced and the respondents have endeavoured to explain the customary incidents of the *birt* tenure, which does not appear to have been attempted in the case of Ram Autar. The main grounds of decision in the case *Ram Autar* v. *Muhammad Mumtaz Ali* (3) are totally different from the facts of the present case. The cases are clearly distinguishable. The learned counsel for the respondents referred to the authorities cited in Syke's Compendium, page 302. He contended that a *birt* was a cession of rights by purchase and that it was not a lease of property. He contended that if any doubt existed as to the grant being one in perpetuity, the fact that one descent had been shown from Fakir Bakhsh to Rajai, would establish the perpetual character of the grant. He further

(1) (1891) Select Decisions Board of Revenue, Oudh
(2) (1890) Rent Appeal No. 165 of 1890 unreported.
(3) (1897) L. R., 24 I. A., 107 : I. L. R., 24 Calc., 853.

contended that Act XXVI of 1866 was not exhaustive; that it applied only to the case of zamindars entitled in their own right, whose villages had in some manner become included in a 'Taluqa'. He contended that the Act did not apply at all to the case of a grant by a taluqdar where the grantee had continued in possession from the date of the grant. He cited the case of *Drig Bijai Singh* v. *Gopal Dat Pandey* (1).

"The appellant, on the other hand, contended that the defendants must bring their case within Act XXVI of 1866. On the authority of the case of *The widow of Shankar Sahai* v. *Raja Kashi Parshad* (2), I hold that Act XXVI of 1866 is not exhaustive. The rules referred to in the Act do not appear to me to be intended to cover the case of persons claiming by grant from the taluqdar. I hold that a right to sub-settlement can be proved otherwise than under Act XXVI of 1866.

"The respondents have established their right to hold the village under grant from the taluqdar as their heritable and transferable estate. The estate has made one descent from Fakir Bakhsh to Rajai and the respondents have established their possession from the time of the grant till the first Summary Settlement."

On this appeal

DeGruyther for the appellant contended that he was not bound in law by the decrees passed at the regular settlement in favour of the respondents. Those decrees were made by consent at the time the appellant was a minor, and when his estate was under the superintendence of the Court of Wards. That being so, it was for the respondents to prove that the consent was given by the Court of Wards by a person having authority to give it. But no such proof had been given, and there was therefore nothing to show that the appellant had been properly represented in the regular settlement proceedings. Reference was made to *Muhammad Mumtaz Ali Khan* v. *Sheoratangir* (3) and *Ram Autar* v. *Muhammad Mumtaz Ali Khan* (4). Nor can

(1) (1879) L. R., 7 I. A., 17: I. L. R., 6 Calc., 218.
(2) (1873) L. R., 4 I. A., 198.
(3) (1896) L. R., 23 I. A., 75 (82); I. L. R., 23 Calc., 934 (940).
(4) (1897) L. R., 24 I. A., 107 (114): I. L. R., 24 Calc., 853 (860).

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it be assumed, as the respondents alleged, that the decrees at the regular settlement only gave them what they had already inherited from their ancestors, for they have not proved that they were at that time entitled to possession as *birt*-holders. The additional Civil Judge found that the documentary evidence on which they relied for such proof had not established their title. And even if it were not so, and they were *birt*-holders, their tenure was not necessarily heritable and transferable. Reference was made to *Gouree Shunkar* v. *Maharajah of Balrampore* (1); the Record of Rights Circular No. 2 of 1861 referred to in Sykes' Taluqdari Law, page 174, and by Sir J. Colvile in *Kishendatt Ram* v. *Mumtaz Ali Khan* (2). The fact that leases had been granted to the respondents was also referred to, and it was pointed out that that would not have been necessary had their tenures been of an under-proprietary character. It was submitted therefore that the respondents had not proved any right to a heritable and transferable interest in the villages in dispute against the appellant.

Cowell for the respondents (except those in appeal 96 of 1903) was not called upon.

1907. *June 20th.*—The Judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

PRIVY COUNCIL APPEALS NOS. 81, 87, 92, 96, 97 AND 101 OF 1903.

In the six cases out of which these consolidated appeals have arisen, the plaintiff was Raja Muhammad Mumtaz Ali Khan, the Taluqdar of Atrauli, and the defendants were persons who, either by themselves or their predecessors in title, claimed under-proprietary rights in villages in his taluqa. These rights are what are known in Oudh as *birt*, or *birt zamindari* rights; and the question for decision is whether persons holding under this tenure have a heritable and transferable right, as against the taluqdar, in the villages in respect of which the *birt* has been created.

In Mr. Sykes' valuable Compendium of the Law specially relating to the Taluqdars of Oudh (p. 173) it is stated that "there

(1) (1878) L. R., 6 I. A., 1 : I. L. R., 4 Calc., 889.

(2) (1879) L. R. 6 I. A., 145 (156) : I. L. R., 5 Calc., 198 (206).

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are several descriptions of *birt* known in Oudh, but . . . the true *birt* is that known as the *bai birt*, created by the taluqdar or proprietor for money paid." In the Gonda Settlement Report—and the cases now under appeal come from that district—the *bai birt* is spoken of as *birt zamindari*.

In the Circular known as the Record of Rights Circular, No. 2 of 1861, the Chief Commissioner of Oudh deals very fully with the subject of *birt* tenures, and lays down the policy of the Government in regard to them.

"Birts," he says, "were given for whole mauzas, or patches of land in mauzas. . . . These tenures, when granted by the taluqdar for money received, will be maintained as representing the proprietary rights of the birtias who by purchase have acquired the position of intermediate holders, and as constituting the portion of the profits left them by the taluqdar. . . Birts of entire mauzas are very common in Gonda and Gorruckpore. They originated in purchases from needy taluqdars, and sometimes in clearing leases of jungle land. In the Ootrowla (Atraula) and Bubuee pergunnahs of the Gonda district, the birtias had been in many instances admitted to direct engagments with the Native Government for years previous to annexation, and, of course, were settled with them, and should have been at the late Summary Settlement, on the principle that we are not bound to restore to the taluqdars what they had lost before our rule commenced."—*Sykes*, p 174.

And the policy of the Government is thus declared:—

"The Chief Commissioner is clearly of opinion that the birtias who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pottahs under the taluqdars, must be maintained in the full enjoyment of their rights, in subordination to the taluqdars."

It appears to their Lordships that, if the respondents in these cases have shown themselves to come within the benefit of the policy announced in this Circular, they acquired, upon the annexation of Oudh by the British Government, absolute under-proprietary rights as against the taluqdar, in the villages in suit. The learned Judicial Commissioner, Mr. Bleonerhassett, in a series of very able and careful judgments, has decided in their favour, and their Lordships entirely accept his conclusions, and the reasons on which they are based. They will humbly advise His Majesty that these appeals ought to be dismissed, and the decrees of the Court of the Judicial Commissioner confirmed. The appellant must pay to the respondents who appeared one set of their costs of the appeals.

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PRIVY COUNCIL APPEALS NOS. 84 AND 86 OF 1903.

The decision in these appeals follows that in the six cases already disposed of. It may be noted that, in these two cases, the relation of the Bictias to the Taluqdar was fixed by orders of the Settlement Court as long ago as 1872. These orders were not made by consent, but after examination of witnesses, and hearing all parties. Moreover, it would seem from the judgment of the Judicial Commissioner that he would have had "no difficulty in finding" that the respondents or their predecessors in title held "direct under native rule, and after annexation," and that the Taluqdar is only entitled to a malikana allowance.

Their Lordships will humbly advise His Majesty that these appeals ought to be dismissed, and the decrees of the Court of the Judicial Commissioner confirmed. The appellant must pay the costs of the appeals.

Appeals dismissed.

Solicitors for the Appellant:—*T. L. Wilson & Co.*

Solicitors for the Respondents:—*Dubbitt, Dyer & Co.*

J. V. W.

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July 1

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Dillon.

KUNDAN LAL AND ANOTHER (PLAINTIFFS) v. GAJADHAR LAL AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 457—Guardian ad litem—Appointment of married woman whose husband is alive.

In no case can a married woman whose husband is living be appointed as a guardian *ad litem*, and if such an appointment is made *de facto* such apparent appointment is not a nullity. *Sham Lal v. Chasita* (1) followed. *Kachaya Kuttiali Haji v. Udumpunthaita Kunhi Pattra* (2) dissented from.

THIS was a suit for a declaration that a decree obtained by the defendants against the plaintiffs in the Court of the Subordinate Judge on the 16th of November 1900 was a nullity as against the plaintiffs because they were not represented in the suit in which the decree was passed by a legally appointed guardian.

* First Appeal No. 149 of 1905, from a decree of Babu Ishri Prasad, Subordinate Judge of Cawnpore, dated the 31st of May 1905.

(1) (1901) I. L. R., 23 All., 459. (2) (1905) I. L. R., 28 Mad., 68

In the former suit the present plaintiffs were arrayed as defendants. They were minors and were represented by their mother and certificated guardian Musammat Jamna Kunwar as their guardian *ad litem*; but no application was made to the Court to have Musammat Jamna Kunwar appointed as guardian *ad litem*, nor was any formal order to that effect passed at any stage up the suit. It was contended that in any case, looking to section 457 of the Code of Criminal Procedure, Musammat Jamna Kunwar could not have been appointed guardian *ad litem*, inasmuch as she was a married woman and her husband was alive. The Court of first instance (Subordinate Judge of Cawnpore) dismissed the suit. The plaintiffs thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram, Dave* for the appellants.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

KNOX, ACTING C.J., and DILLON, J.—The point which we have to consider in this appeal is whether the decree, dated the 16th of November 1900 is a nullity as against the plaintiffs as they were not represented in the suit in which the said decree was made by a legally appointed guardian. The plaintiffs up to the time when the suit was brought which resulted in the decree of the 16th November 1900 were, and one of them still is a minor. In the former suit they were arrayed as defendants under the guardianship of Musammat Jamna Kunwar, their mother and certificated guardian, but no application was made to the Court to have Musammat Jamna Kunwar appointed as guardian *ad litem* nor was any formal order at any stage in the suit to that effect passed. It is contended by the learned advocate for the appellants that in any case, looking to the language of section 457 of the Civil Procedure Code, Musammat Jamna Kunwar could not have been appointed guardian *ad litem*, she being a married woman with her husband still alive. It is true that the husband is said to be more or less *non compos mentis*, but the words used in section 457 are very clear and emphatic; they are in no way hedged or limited by any qualifying word, and according to them a married woman cannot be appointed

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guardian *ad litem*. This was the view taken by this Court in *Sham Lal* v. *Ghasita* (1) and this case is followed in an unreported case, S. A. No. 1234 of 1905, decided on the 1st of February 1907. On behalf of the respondents an attempt was made to distinguish this case from those cases on the ground that in neither of them was a married woman a guardian appointed by an authority competent to appoint a guardian. Musammat Jamna Kunwar is a guardian appointed by competent authority to Kundan Lal and Balbhadra Prasad while they were minors. Our attention is called to the provisions of section 443 of the Code of Civil Procedure, also to the ruling in *Kachayi Kuttiali Haji* v. *Udumpumthabi Kunhi Puttira* (2). Looking, however, to the plain words of section 457 we hold that in no case can a married woman be appointed as guardian *ad litem*. Inasmuch as she is so disqualified, any apparent appointment of her as guardian is not a mere irregularity.

We decree the appeal, set aside the decree of the Court below and grant the plaintiffs a declaration to the effect that decree No. 77, passed by the Subordinate Judge on the 16th of November 1900, and the decree in appeal be discharged. The plaintiffs will get their costs in both Courts.

Appeal decreed.

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July 9.

Before Mr. Justice Richards and Mr. Justice Griffin.

DAMODAR DAS (PLAINTIFF) *v.* SHEORAM DAS AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), sections* 198, 211 *and* 216—*Principal and agent—Ratification—Suit for adjustment of accounts—Two appellate decrees in similar terms—Appeal from one of such decrees only—Res judicata.*

From the decree in a suit for adjustment of accounts both parties appealed. Both appeals were decided by one and the same judgment. Two decrees were framed; but these were in substance identical. The plaintiff appealed from the decree in one appeal only. *Held* that his appeal was not barred by reason of his not having appealed also from the decree in the other appeal. *Mariam-nissa Bibi* v. *Joynab Bibi* (3) and *Panchanada Velan* v. *Vaithinatha Sastrial* (4) followed.

* Second appeal No. 980 of 1906, from a decree of E. O. E. Leggatt, Esq., District Judge of Bareilly, dated the 2nd of June 1906, modifying a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 30th of September 1904.

(1) (1901) I. L. R., 23 All., 459.
(2) (1905) I. L. R., 29 Mad., 68.
(3) (1906) I. L. R., 33 Calc., 1101.
(4) (1905) I. L. R., 29 Mad., 383.

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The defendants as agents for the plaintiff entered into certain contracts for the sale of grain for future delivery. The defendants discharged these contracts by means of goods of their own, and when subsequently the plaintiff sent on grain to the defendants to meet these contracts the defendants sold the plaintiff's grain at a profit. The defendants did not inform the plaintiff either that they had fulfilled the contracts with their own grain or that they had resold the plaintiff's grain at a profit

Held that the plaintiff was entitled to whatever profit was realized by the defendants on this latter transaction.

Held also that where on a direction by the principal to his agents to purchase grain for him, the agent sold to him their own grain at a price higher than the prevailing market rate, the principal was entitled to repudiate the transaction and could not be alleged to have ratified it in the absence of knowledge that the agents were selling their own property and were charging him in excess of the market rate.

THIS appeal arose out of a suit for an adjustment of accounts between the plaintiff and the defendants. The defendants were commission agents carrying on business at Calcutta, and they had acted as agents for the plaintiff in a considerable number of transactions. The Court of first instance (Subordinate Judge of Bareilly) made a decree against which both parties appealed. The lower appellate Court (District Judge of Bareilly) disposed of both appeals by one judgment and found in favour of the defendants for a sum of Rs. 1,401-4-0 principal, and Rs. 232-5-6 interest from the institution of the suit to the date of the decree at 6 per cent. per annum. The decrees in both appeals were, *mutatis mutandis*, exactly similar. The plaintiff appealed from one only, and it was objected *in limine* that the appeal was barred by the principle of *res judicata*. The appeal further questioned the decision of the District Judge as to a variety of specific items upon various grounds, which are dealt with in the judgment of the Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Mr. *M. L. Agarwala*, for the respondents.

RICHARDS and GRIFFIN, JJ.—This was a suit for an adjustment of accounts between the plaintiff and the defendants. The defendants are commission agents, carrying on business in Calcutta, and they have acted as agents for the plaintiff in a considerable number of transactions. On the 2nd of March 1902, accounts were settled between the parties, and a sum of

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Rs. 684-5-6 was found due to the plaintiff. The case was originally tried before the Subordinate Judge of Bareilly, and the result of his decree was an appeal by the plaintiff and also an appeal by the defendants. The lower appellate Court disposed of both appeals in one judgment and found in favour of the defendants for a sum of Rs. 1,401-4-0 principal and Rs. 232-5-6 interest from the institution of the suit to the date of the decree at 6 per cent. per annum. He made a similar order in the plaintiff's appeal which was No. 411. The plaintiff has brought this second appeal without instituting a second appeal against the decree in appeal No. 411. As a preliminary objection, it was urged before us that the present appeal could not be sustained on the ground that the decree in No. 411 had become final and operated as *res judicata*. In our judgment there is no force whatever in this objection. There was in fact but one decree settling the accounts between the parties. No doubt this decree was written out in duplicate in both the appeals to the lower appellate Court. We overrule this preliminary objection, and in doing so we may refer to the case of *Mariem-nissa Bibi* v. *Joynab Bibi* (1) and also to the case of *Panchanada Velan* v. *Vaithinatha Sastrial* (2).

To go to the merits. It must be remembered that throughout there existed between the parties the relation of principal and agent. The several items in dispute require separate consideration. The first item is a sum of Rs. 1,452-15-9. This sum represents a profit made by the defendants under the following circumstances. The defendants as agents for the plaintiff entered into certain contracts for the sale of certain grain for future delivery. The defendants by means of goods of their own discharged these contracts, and when plaintiff sent on goods to the defendants, the contracts being already fulfilled, the latter resold the goods and realized the substantial profit of Rs. 1,452-15-9. The defendants did not inform the plaintiff that they had by means of their own goods fulfilled the contracts made on his behalf, nor did they inform him that they were reselling the goods forwarded by the plaintiff. The plaintiff claims that in the adjustment of the accounts between himself and the defendants he is entitled

(1) (1906) I. L. R., 33 Calc., 1101. (2) (1905) I. L. R., 29 Mad., 333.

to have this sum of Rs. 1,452-15-9 put to his credit. The defendants, on the other hand, contend that inasmuch as the plaintiff was bound to discharge the contracts that had been entered into on his behalf, it made no difference to the plaintiff that the defendants resold the plaintiff's goods and made a profit, that the plaintiff lost nothing, and the sum of Rs. 1,452-15-9 should not be brought into the accounts at all. The learned District Judge in dealing with this matter (at page 18 of the paper-book) says:—"It seems to me that in all three cases the Court below has been under a misapprehension as to the nature of the transactions in question. In each case the defendants' duty, when they got instructions from the plaintiff to make a forward contract for the sale of goods, was simply to make the contract as soon as possible at the market rate prevailing at the time for the delivery desired. That being done, the plaintiff was bound to deliver at the rate contracted for at the time agreed on, whether the result was a loss or gain to him, and it follows that the defendants were not bound to credit him with more than the price contracted for. It was not the defendants' duty (and indeed this has never been contended) to hold on behalf of the plaintiff until they thought a favourable opportunity had arrived for selling. In fact, the plaintiff had a sort of representative in Calcutta, Durga Prasad, who used to advise him as to when he should sell or buy. The defendants had simply to obey orders. When the contract had been completed on behalf of the plaintiff the matter passed out of his hands and the goods, which he was bound by the contract to deliver, ceased for all intents and purposes to be his own, and it mattered nothing to him who actually took delivery of his particular consignment, and indeed it may well be asked why the plaintiff selling on a particular date at the market rate then prevailing should expect to receive payment at a higher rate than he had contracted for." We do not at all agree with the view taken by the learned Judge as to the result of the dealing by the defendants in the plaintiff's goods. Notwithstanding his reference to Durga Prasad it cannot be for a moment disputed that the defendants were the agents for the plaintiff. So long as the relation of principal and agent continued between the plaintiff and defendants, the plaintiff was entitled to the exercise of the

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disinterested skill, diligence and zeal of the defendants for his exclusive benefit.

It is a well recognised principle of law that an agent is not entitled to make a secret profit by dealing in the agency on his own account. Section 216 of Act No. IX of 1872 expressly provides that where an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. Section 211 provides that the agent is bound to conduct the business of his principal according to the directions given by the principal. If he does otherwise and a loss is sustained, he must make good the loss; if profit accrues, he must account for it. An agent must never place himself in a position in which it is possible that his duty to his principal and his own interests would stand in opposition to each other, and on this principle it has been held that an agent employed to settle a debt cannot purchase it upon his own account. So long as the relation of principal and agent continues, the agent is only entitled to his ordinary compensation for his services; all other profits and advantages made by him in the business belong to his employers. The law is well put in Story on Agency, para. 207:—"It may also be stated as generally true that all profits which are made by the agent in the course of the business of the principal belong to the latter. Indeed, this doctrine is so firmly established upon principles of public policy that no agent will be permitted to take beyond a reasonable compensation for his services or any profit incidentally obtained in the execution of his duty, even if sanctioned by usage. Such a usage has been severely stigmatized as a usage of fraud and plunder. When the profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct, and when the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof." It seems to us perfectly clear that the defendants are bound to account for the profit which they made by the resale of the plaintiff's goods, and it is no answer to the plaintiff's claim to say that the plaintiff lost nothing by the transaction.

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Accordingly we hold that the plaintiff is entitled in the settlement of the accounts between him and the defendants to take credit for this sum of Rs. 1,452-15-9.

The next disputed item is a sum of Rs. 264-13-0. This sum represents a loss incurred under the following circumstances. The plaintiff directed the defendants to purchase on his behalf certain grain. Without informing the plaintiff the defendants sold to the plaintiff their own goods, the price being slightly in excess of the market rate, and they charged commission and brokerage. The plaintiff claims to be entitled to repudiate this transaction altogether. It resulted in a loss to the plaintiff of Rs. 264-13-0. It is alleged that the plaintiff ratified this transaction. It, however, appears that he was not aware until after the institution of the suit that the defendants had charged him in excess of the market rate, nor did he know until November 1902, that the defendants were selling their own goods. Section 198 of Act No. IX of 1872 provides that there can be no valid ratification until after knowledge of all material facts. We hold that there could be no ratification under the circumstances by the plaintiff, and that he is, therefore, entitled to repudiate the whole transaction. We hold, therefore, that the plaintiff is not to be debited in the adjustment of the accounts with any part of this sum.

The third item in dispute is a sum of Rs. 107-5-0. The plaintiff had instructed the defendants to buy certain wheat for him. The defendants in pursuance of these instructions sold to the plaintiff their own wheat. The market fell and they resold at a loss, charging the plaintiff commission and brokerage on both the purchase for the plaintiff and the resale afterwards. The plaintiff contends that the defendants are not entitled to charge the brokerage and commission upon the sale to him without his knowledge of their own goods. We hold this contention to be well founded. The defendants have got credit for their brokerage and commission upon the resale.

The fourth item is a sum of Rs. 173-10-6. This item was another transaction of an exactly similar nature to the one last mentioned. The brokerage and commission on the sale to the plaintiff of the defendants' own goods amounts to the sum of

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Rs. 173-10-6. It is true that the learned District Judge allowed the plaintiff's contention as to 25 tons, but the sum which we have mentioned is brokerage and commission upon the balance. We hold, as in the case of last item, that under no circumstances could the defendants claim brokerage and commission upon a sale of their own property to their principal without his knowledge and consent.

The only remaining item is a sum of Rs. 83-11-6. It appears that by a mistake the defendants sent a number of gunny bags to the plaintiff. The plaintiff informed the defendants of the mistake. The defendants gave no instructions to the plaintiff as to what should be done with the gunny bags, and they remained for a considerable period with the plaintiff. The learned Judge has charged the plaintiff with the full price of the gunny bags in the first instance, allowing him a similar sum on their return. The plaintiff has also been charged with the freight both ways. These are admitted facts. It seems to us that the plaintiff should not be charged with the defendants' mistake. The plaintiff was only to blame in so far as he did not at once return the bags. But, on the other hand, it must be remembered that he informed the defendants that the gunny bags had been sent by mistake and the defendants gave no instructions as to what should be done. This sum we also think must be credited to the plaintiff.

The amounts of the several items we have dealt with are undisputed and have been agreed to by the parties, they amount in all to a sum of Rs. 2,082-7-9. The decree in defendants' favour was for a sum of Rs. 1,633-9-6, which was made up of a sum of Rs. 1,401-4-0 principal, and Rs. 232-5-6 interest up to the date of the institution of the suit. It is quite clear that the defendants were not entitled to interest unless there were some moneys due to them. In the view which we take, there was nothing due by the plaintiff to the defendants. Accordingly the sum of Rs. 1,401-4-0 must be deducted from Rs. 2,082-7-9 to which we hold the plaintiff entitled to credit.

This will leave a balance in favour of the plaintiff of the sum of Rs. 681-3-9.

We accordingly allow the appeal, set aside the decrees of the lower Courts, and we find that on the settlement of the accounts

between the plaintiff and the defendants there is due to the plaintiff the sum of Rs. 681-3-9. In addition to this the plaintiff will get interest from the institution of the suit on the sum of Rs. 681-3-9 at the rate of 6 per cent per annum, and future interest at the same rate upon this amount until the amount is paid. The objection is not pressed. It is dismissed. The parties will have their proportionate costs in all Courts.

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Appeal decreed.

REVISIONAL CRIMINAL.

1907 *July* 30.

Before Mr. Justice Richards.

EMPEROR v. GOKUL.*

Act (Local) No. I of 1900—(*United Provinces Municipalities Act*), *sections* 82, 87(3)—*Application for permission to build—Implied permission—Power to erect necessary scaffolding.*

Where application for permission to build has been made to a Municipal Board and the period mentioned in section 87(3) of the Municipalities Act, 1900, has expired, the applicant is in the same position as if the erection of the building specified in his application had been formally sanctioned by the Board. A sanction, express or implied, to the erection of a specified building necessarily carries with it a right to put up such ordinary scaffolding as would be necessary under ordinary circumstances for the execution of the work.

IN this case one Gokul applied to the Municipal Board of Cawnpore for sanction to erect certain buildings within Municipal limits. For the space of one month the Board took no notice of Gokul's application. Gokul thereupon applied to the Board again for orders on his former application, but the Board took no notice of this either. After the lapse of a further period of one month Gokul commenced to erect the buildings in respect of which he had applied for sanction. In so doing Gokul set up some scaffolding. Thereupon the Board ordered him to take down the scaffolding which he had erected, and, on his failure to do so, prosecuted him. Gokul was convicted under sections 168 and 147 of the Municipalities Act, 1900, and sentenced to pay a fine. He thereupon applied in revision to the High Court to have the conviction and sentence set aside.

* Criminal Revision No 380 of 1907

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EMPEROR v. GOKUL.

Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

RICHARDS, J.—This is an application in revision to set aside the conviction of the petitioner under sections 168 and 147 of Act I of 1900. It appears that the petitioner having occasion to erect certain buildings in the city of Cawnpore, duly applied to the Municipal Board for sanction. The Municipal Board neglected and omitted for one month after the receipt of that valid notice to make or deliver to Gokul any order in respect thereof. Gokul thereupon again called the attention of the Board to their omission or neglect, and this omission and neglect continued for a further period of a month. Thereupon Gokul commenced to erect the buildings for which erection he had given notice to the Municipal Board. In doing as he did Gokul was acting quite lawfully. Sub-section (3) of section 87, expressly provides that under these circumstances the Board shall be deemed to have sanctioned the proposed buildings absolutely. It became necessary in the course of the building to put up certain scaffolding, and there is nothing to show that the scaffolding which Gokul put up was anything other than the ordinary scaffolding that must of necessity have been put up for carrying out the buildings intended by Gokul. The Municipal Board, however, being unable to interfere with the buildings set to work to try and make Gokul take down the scaffolding as being in contravention to section 82 and as a consequence of Gokul's refusal to take down the scaffolding the present prosecution was instituted. I do not think that the Municipal Board of Cawnpore are to be congratulated on their action in this matter. Even if they had the power to order Gokul to take down the scaffolding, I do not think under the circumstances that they ought to exercise that power, more particularly as Gokul, instead of defying them, appears to have asked their consent to the maintenance of the scaffolding as soon as any question was raised. In my opinion, at the expiration of the times mentioned in clause (3) of section 87, that is to say at the expiration of 15 days after the second communication from Gokul, he was placed in the same position as if he had submitted plans of his proposed buildings to the Municipal Board

and that they had written back informing him that an order had been made sanctioning the erections in accordance with the plans. It must be assumed for the purposes of this case that the erection of a scaffolding sooner or later was necessary in order to execute the buildings which in the events which happened are to be taken as having been absolutely sanctioned In my judgment the sanction to the erection necessarily carried with it a right to put up such ordinary scaffolding as would be necessary under ordinary circumstances for the execution of the works; and, as I have already stated, it has never been suggested that there is anything extraordinary in the scaffolding put up by Gokul. I think it can hardly be urged that if the Board had passed an order sanctioning Gokul's building in accordance with the plans and specifications which he furnished the Board, it would be necessary for him to make a fresh application for the erection of the necessary scaffolding. Section 82 is relied upon as showing that an order for scaffolding is necessary in addition to the permission to build. It seems to me that section 82 was intended to apply to the temporary occupation of the streets, and certainly it was never intended to apply to the scaffolding necessary for the erection of buildings, sanction to build which had already been given. The case strongly suggests that the Municipal Board are now trying to prevent the erection of a building which they might have prevented had they taken the proper means at the proper time. I have no hesitation in setting aside the order of the Magistrate of the first class, dated the 22nd of May 1907, and also the order of the learned Additional Judge, dated the 12th of June 1907. The fine, if paid, will be refunded.

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July 30.

APPELLATE CIVIL.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Dillon.

SUKHDEO PRASAD AND ANOTHER (PLAINTIFFS) *v.* NIHAL CHAND (DEFENDANT) *

Market—Right of zamindar to establish a market on his own land—Regulation No. XXVII of 1793—Regulation No. VII of 1822, section 9.

There is no legal objection to the holding by any person of a "hat", or market, whenever and wherever he may please, provided that he does so on his own land and in such a way as not to be a nuisance to neighbouring landholders who have equal rights with him. *Kedarnath* v. *Raghunath* (1), *Sheikh Bisharut Ally* v. *Seetul Misser* (2), *Meeta Bahoo* v. *Sheikh Surwar Ali* (3), and *Bhinuk Chowdhree* v. *The Collector of Jounpore* (4), referred to.

THE plaintiffs in this case came into Court alleging that from time immemorial they and their ancestors enjoyed the exclusive privilege of holding markets within the entire area of the five mahals of the village of Shamsabad, and of collecting *chaudharahat* dues on all articles and live-stock sold within that area either upon market days or on other occasions. They also alleged that from time immemorial no other market had been held within that area. Their cause of action was stated to be that the defendant had, on or about the 21st of July 1901 started a new market within the above-mentioned area, and within a few yards distance of the old market place, and had been collecting *chaudharahat* dues upon cattle and other things sold there. The plaintiffs prayed for an injunction restraining the defendant from opening any new "hat" within the limits of the five mahals of the village Shamsabad and from interfering with the plaintiffs' rights. They also asked for damages. The Court of first instance (Subordinate Judge of Agra) dismissed the plaintiffs' suit for an injunction, but gave them a decree for damages upon the finding that the defendant had used improper means to prevent persons from going to the plaintiffs' market. From this decree the plaintiffs appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellants.

* First Appeal No. 46 of 1905, from a decree of Babu Raj Nath Prasad, Subordinate Judge of Agra, dated the 10th of October 1904.

(1) N.-W. P., H. C. Rep., 1874, 104.
(2) N.-W. P., H. C. Rep., 1869, 40.
(3) (1866) 14 S. D. A., N.-W. P., 439.
(4) N.-W. P., H. C. Rep., 1867, 271.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the respondent.

KNOX, ACTING C. J., and DILLON, J.—The plaintiffs, Sukhdeo Prasad and Ganeshi Lal, who represent themselves as residents of Shamshabad, brought a suit against one Lala Nihal Chand in which they prayed that an injunction be issued upon the defendant preventing him from commencing any new 'hat' within the limits of the five mahals of the village Shamshabad and from interfering with the plaintiffs' rights. They also asked for damages. The case, as stated by them in the plaint is that from time immemorial the plaintiffs and their ancestors have the exclusive privilege of holding markets within the entire area of the five mahals of the village Shamshabad, and of collecting *chaudharahat* dues on all articles and live-stock sold within that area either on market days or any other occasions. They further alleged that from time immemorial no other market has been held within that area; that on or about 21st July 1901, the defendant has started a new market within that area, and within the distance of a few yards of the old market place, and has been collecting *chaudharahat* dues upon cattle and articles sold.

In reply the defendant contends that he is the owner and zamindar of the mahal within which, and of the land on which, he has held a 'hat,' and that he has a perfect right to hold the 'hat' on his own land and within his own area, and the plaintiffs have no right to impeach his acts. He puts the plaintiffs generally to strict proof of the allegations contained in the plaint, most of which he expressly denies. He adds that the 'hat' complained of is held on land appertaining to mauza Patti Siktara and not to Shamshabad. The Court below dismissed the plaintiff's suit with the exception of the claim for damages, which it allowed, upon the ground that the defendant had made use of improper means to force buyers and sellers from going to the plaintiffs' 'hat' and compel them to go to his own 'hat.'

The pleas taken in appeal are three in number:—

(1) That upon the evidence it has been proved that the plaintiffs are the Chaudhris of mauza Shamshabad, which includes Patti Siktara, and they have the exclusive right to hold the

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market within that area and to realize the bazar dues; (2) that the right claimed has been proved to be an ancient and immemorial one; (3) that the plaintiffs have proved the full amount of damages claimed by them.

The defendant filed a cross appeal in which he urged that it had not been proved that improper means were used by him to prevent people from resorting to the plaintiffs' 'hat' and that no right to compensation had been made out.

Before proceeding to state the arguments that were addressed to us during the hearing of this appeal by the learned advocates on both sides, it would be as well perhaps if we were to make it clear what the plaintiffs' case was in the lower Court. It is clear to us from paragraph 5 of the plaint, as well as from the plaintiff's own evidence, p. 59A, and his statement at p. 1A and from the evidence of his witnesses, that his case was that the right to hold a market had accrued to his predecessors by reason of the fact that they were the full owners of Shamshabad and of its four pattis. That after having acquired the right in this way they claimed that the rights still subsisted, although they had lost all their rights in patti Siktara, and nearly all in Shamshabad. Having made this quite clear, we now proceed to state the case that was set up for the plaintiffs by their learned advocate at the hearing of this appeal.

It was argued that the right claimed had its origin in a grant by the Moghul Government and that that grant was ratified by the British Government when the province of Agra was ceded to them in 1801. The plaintiffs had no documentary evidence of the grant in their possession, but its existence must be assumed, they said, because they have been in peaceful enjoyment of the right since 1839. It is important that the two cases set up by the plaintiffs should be clearly differentiated, because in the case as set up in the plaint they might have the right of continuing to hold a market in Shamshabad although they had lost their rights as owners, but this could not authorize them to interfere with the rights inherent in the owners of Siktara and other adjacent mahals to set up markets in their own mahals. In the case of a grant or franchise (which, as we have already said, was the case set up by the plaintiffs here) on the analogy of the English law,

they would have the right to restrain others from holding a market within such a distance from their own as to raise the inference that such action would interfere with their rights under the grant.

Looking at the case as presented by the learned advocate for the appellants, we had to consider (1) whether the plaintiffs have proved any grant from sovereign authority such as they claim was made in their favour; (2) whether the grant was of such a nature as would authorize us to issue an injunction restraining the respondent from holding the market set up by him on the ground that it amounted to an infringement of the appellants' right.

It was asserted, and apparently on good authority, that in England markets are derived from royal grant or prescription which presumes a grant; and further that if it is proved to be to the damage of a market already existing, the grant may be repealed by *scire facias*, for the King has been deceived in his grant. *R.* v. *Butler* (1). It has been also held (2 Saund., 174) that whether the new market is a nuisance to the old one is a matter of evidence.

So far as Upper India is concerned much valuable information on this subject can be derived from the preamble to Regulation XXVII of 1793. The preamble sets out that "it has ever been a well-known law of the country, that no person can establish a 'gunge,' 'haut' or 'bazar,' without authority from the governing power. Grants from the sovereign or his representative delegating this authority, as well as universal tradition, prove that this right was asserted by the Muhammadan Government; and the orders of the Honourable Court of Directors, as well as repeated declarations and promulgations by the British Administration, demonstrate that this right was constantly asserted by the Company. It was, however, judged advisable to leave the exercise of this privilege to the landholders, Government contenting themselves with imposing general regulations for the prevention of undue exactions, and occasionally interfering to modify or abolish particular imposts as they occurred or were discovered. Experience having at length proved that prohibitory

(1) 1603, 3 Lev., 220.

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orders for preventing oppression were not attended with the desired effect, it was determined on the 11th June 1790, to take from the landholders the power of imposing and collecting duties altogether, and to exercise this privilege immediately and exclusively on the part of Government." Careful distinction was made in the Regulation between 'sayar' which was an impost, and 'sayar' which was not in reality a duty but a consideration for the use of grounds, shops, and other buildings belonging to the landowner. The Government, while pointing out that landholders were not entitled to any compensation, still determined to compensate holders of malguzari lands who had been permitted to collect gunge, haut, bazar or other dues on their land. After providing for such compensation, the preamble continues as follows :—"It was, in consequence, determined, on the 28th July 1790 to abolish the sayar collections (with certain specified exceptions) throughout the three provinces, leaving it to future consideration what internal duties or taxes should be imposed in lieu of them." It was further provided that "no landholder, or other person, of whatever description, shall be allowed to collect, in future, any tax or duty of any denomination," and the privilege of imposing and collecting internal duties of all kinds was finally resumed from landholders, and all duties, taxes and other collections coming under the denomination of 'sayar,' with certain exceptions, which do not apply to the present case, whether made by European or natives, either on their own or on the public account, in gunge, haut, or bazar were abolished. This Regulation extended to the three provinces of Bengal, Behar and Orissa, and was never, so far as we have been able to ascertain, made law in the province of Agra. Since the passing of this Regulation several attempts have been made, from time to time in the provinces to which it refers, to set up rights similar to those which are claimed by the plaintiffs in this case, but the claim has been invariably disallowed, as will be seen from the following cases: *Mussammut Dootch Bibia* v. *Raja Oodwunt Singh* (1), *Poorunmul* v. *Khedoo Sahoo* (2) and many others, which, as they relate to other provinces, we do not think it necessary to set out in detail here. In these provinces

(1) 2 S. D. A., L. P., 303. (2) 7 S. D. A., L. P., 282

the question does not seem to have been thoroughly dealt with until the year 1822. In that year Regulation VII found a place in the Statute book, and was afterwards extended by Regulation IX of 1825 to all lands not included within the limits of estates for which a permanent settlement has been concluded in the manner prescribed by Regulation VIII of 1793 and Regulation II and XXII of 1795. By Regulation VII of 1822 the Government determined to ascertain and settle and record the rights, interests, privileges and properties of all persons and classes, owning, occupying, managing or cultivating the land, &c., &c., or paying or receiving any cesses, contributions or perquisites to or from any persons resident in or owning, occupying, or holding parcels of any village or mahal. Collectors on revising the settlement of the land revenue were to prepare as accurate a report as possible, and the information collected was to be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of judicature. It was also enacted by the closing words of section 9 of the same Regulation "that all cesses or collections not avowed and sanctioned nor taken into account in fixing the Government 'jama' shall be held illegal and unauthorized unless now or hereafter specially sanctioned by Government."

In order to bring their claim within the provisions of the law, the appellants maintained that their claim was sanctioned. In support of their contention they referred us to paper No. 171, page 89 of the appellant's book.

In that paper in the column of remarks will be found this entry:—"A bazar is held twice a week, when grain and cotton cloths are principally disposed of." They also referred us to papers Nos. 359c, 32c, and 360c. All these papers will be found printed at pp. 82, 83 and 84 of the appellant's paper-book. The first is headed as an "Extract copy of an agreement as to the revision of settlement under Regulation IX of 1833, in respect of village Kasba Shamshabad, pargana Iradatnagar, district Agra." The only portion of this paper that is at all of any value is where it declares that two chaukidars get their pay from the weighment fees collected in the market. The remaining two papers are copies of the wajib-ul-arz. In the former it is said

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that the chaukidars are paid by Pitambar Das out of weighment fees levied in the market. Paper No. 360c does not help at all. Nowhere in these papers do we find that the cesses claimed by the appellants were avowed or sanctioned by Government, and still less do we find that they were taken into account in fixing the Government jama. If they were so taken into account, notice of the fact would most undoubtedly appear in the record made by the settlement officer which is to be found in the forefront of every settlement misl (record). From the fact that that paper has not been produced, we have no alternative but to infer that these cesses were not taken into account in fixing the Government jama and that they are illegal and unauthorized.

Therefore if we were to hold, which we do not, that the appellants have established a grant from Government in their favour, their case would not be helped any further, because, in addition to the grant, they would have to show that the cesses which, by virtue of this grant, they claim to enforce were avowed and sanctioned and taken into account in fixing the Government jama, or that they were, after the settlement which was made under regulation VII of 1882, specially sanctioned by Government. No attempt has been made to prove any such sanction. We learn, moreover, from paper C.66, dated the 10th of December 1880, that the lamlardar had the right of establishing a bazar on his land on any day he thought proper. Claims to establish a right similar to that which is claimed by the plaintiffs in this case have apparently been rare in the province of Agra. Only some two or three cases are to be found in the reports dealing with a similar question. The first of these is an unreported case of *Lala Basudhar* v. *Baijnath Bhurka* (1). That case is on all fours with the case before us. It was a suit brought by some tenants against the zamindars of Kurra in the district of Allahabad on the allegation that they had had a long established market in their mauza, from the dues and profits of which they derived a considerable income; that the defendants had recently established a new market very near to the plaintiff's market, and that both markets being held on the same day in the week the plaintiffs were deprived of the profits of their market. It was held by

(1) First Appeal No. 121 of 1869, decided 15th December, 1869.

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the learned Judges in that case, (Morgan C. J., and Ross, J.,) that there was no authority to show that a suit of this description can be maintained here: that though in England a market could be held only by charter from the Crown or by long usage from which a grant would be presumed, the prerogative of conferring this right is not known here. From what we have already said it will be seen that, with all deference to the learned Judges who decided that case, we are not prepared to agree with them in this part of their judgment, but we do agree with them when they go on to hold that the owner of land is free to use it for a market or for any other lawful purpose, and the owner of a neighbouring market has no right of suit for the loss which may ensue by the establishment of the new market. This case was followed in *Kedarnath* v. *Raghunath* (1). From several decisions it would appear that the Sadar Dewani Adalut of these provinces held that claims of this nature were claims which could not be enforced by Courts of law unless they had been sanctioned by Government through the Settlement Officer. Vide *Sheikh Bisharut Ally* v. *Seetul Misser* (2), *Meeta Sahoo* v. *Sheikh Surwur Ali* (3), *Bhunuk Chowdhree* v. *The Collector of Jounpore* (4).

Further, we learn from the Circulars of the Court of Nizamut Adawlut of these provinces edited by J. Carrau (1855), p. 135, that the Sadar Diwani Adalat "decided on appeal from an order of the Commissioner of circuit of the 15th Division that zamindars and other proprietors of land have a right to establish *hauts* or fairs on their own land and to hold them on any day that they think proper, and that it is not competent to Magistrates to prohibit the establishment of *hauts* or fairs, or to fix the day on which they may be held, on the plea of interfering with the right of a neighbouring *haut*-holder or on any other ground." The value of this is that it shows what view was taken by the Sadar Diwani Adalat of the law as it then stood.

In opening his case the learned advocate for the appellants drew our attention to certain papers which are to be found at page 61, *et seqq.*, of the appellants' book as showing that immediately after the Mutiny others had tried to open markets in Shamshabad

(1) N.-W. P., H. C. Rep., 1874, 104.
(2) N.-W. P., H. C. Rep., 1869, 40.
(3) (1860) 14 S. D. A., N.-W. P., 439.
(4) N.-W. P., H. C. Rep., 1867, 271.

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and been prevented. It would appear that on the 15th of November 1870 the Magistrate authorized the Deputy Magistrate of the pargana, if he apprehended any disturbance on account of the rival claims to hold markets, he was to initiate a case under (*sic*) section 182 of Act No. V of 1861—obviously a mistake for section 282 of Act No. XXV of 1861. The action taken by the Magistrate, as he himself is careful to point out in the same paper in no way deals with the claims of the parties. They are referred to the Civil Courts. All that he was concerned with was to prevent a breach of the peace between the two angry claimants to hold a market.

But to return to what we have in the preceding part of our judgment pointed out as the view taken by the Civil Courts, and by the Chief Criminal Court in these provinces.

No precedent to the contrary has been shown to us, and in the face of what we therefore believe to be the uniform current of decisions on this subject, we are not prepared to resort to such an extreme step as to interfere with the liberty of the subject to hold a *haut* whenever and wherever he may please, provided he do so on his own land in such a way as not to be a nuisance to neighbouring landholders who have equal rights with himself. In the present case the person who asks us to interfere with the rights of a landholder is himself no longer a landholder. He was originally one, and as such would have had the right to establish a *haut* on any portion of his estate. But when he lost his status as landholder, his privileges presumably would lapse with the loss of the land.

Be this as it may, he certainly has no status whereby he can ask us to interfere with the rights which belongs to the respondents who are landholders.

The result is that the pleas taken in appeal fail, and the decree of the lower Court is affirmed so far as it sets aside the plaintiffs' claim, and the plaintiffs' claim is dismissed *in toto*. The respondent will get his costs both of this Court and the Court below.

Appeal dismissed.

FULL BENCH.

1907
August 13.

Before Mr. Justice Knox, Acting Chief Justice, Mr. Justice Banerji, Mr. Justice Burkitt, Mr. Justice Richards and Mr. Justice Dillon.

HARI RAM (DEFENDANT) v. AKBAR HUSAIN (PLAINTIFF).*

Act No. VII of 1870 *(Court Fees Act), sections* 9, 10, 11 *and* 28—*Court fee—Plaint—Court fee on plaint discovered during progress of suit to be insufficient—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), section* 4.

Held that when it has been discovered that, through mistake or inadvertence a plaint has been filed on an insufficient court fee stamp, the Court upon discovering the mistake can, at any time and without any regard to limitation, have the proper court fee made up, and when it is so made up, the plaint is as valid as if it had been properly stamped when presented. The principle of the decision in *Balkaran Rai* v. *Gobind Nath Tewari* (1) so far as applicable to plaints rejected.

THIS was a suit for the recovery by right of pre-emption of certain muafi and zamindari property, and was valued for the purposes of court fee under section 7, clause (v), sub-clause *(c)*, at fifteen times the nett profits, which the plaintiff stated to be Rs. 45. The officer of the Court reported that the plaint was sufficiently stamped, and it was admitted and entered in the register of civil suits. The defendant in his written statement took the plea, among others, that the plaint was not sufficiently stamped. Thereupon the Court (Munsif of Amroha) framed an issue as to the sufficiency of the stamp. It took evidence and came to the conclusion that the profits of the property has been underestimated by the plaintiff, and that the court fee paid was insufficient. It did not declare the amount of the deficiency, and it did not require the plaintiff to make it good, but dismissed the suit upon the ground that upon the date on which it found the amount of court fee to be insufficient, the period of limitation for the institution of a suit for pre-emption had already expired. Against this decision the plaintiff appealed to the Subordinate Judge of Moradabad, who allowed the appeal and remanded the suit under section 562 of the Code of Civil Procedure to the Court of first instance. From this order the present appeal was preferred by the defendant.

* First Appeal No 99 of 1906, from an order of Sheikh Manla Bakhsh, Subordinate Judge of Moradabad, dated the 7th of September 1906.

(1) (1890) I. L. R., 12 All., 129.

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Munshi *Gokul Prasad* (with whom Dr. *Satish Chandra Banerji*), for the appellants contended that the provisions of section 10 of Act No. VII of 1870 could only be applied to the special class of cases in which the court has of its own motion issued a commission to a proper person directing him to make an investigation into the amount of annual nett profits or market value of the subject-matter claimed, and not to cases, for instance, in which the Court has held a similar inquiry in person, or in which it had arrived without inquiry at a finding that the fee payable in the suit had been wrongly computed. He further contended that for the last seventeen years, since the Full Bench of this Court had decided the case of *Balkaran Rai* v. *Gobind Nath Tewari* (1) this Court had drawn a sharp distinction between cases in which a document had been presented to a Court without being properly stamped through mistake or inadvertence of the party presenting it and cases in which the document had been through mistake or inadvertence of the Court received by the Court without being properly stamped. To the latter class of cases only had the indulgence allowed by section 28 of the Court Fees Act been granted, and as regards the former class of cases it had been held that the Courts could not give time for paying in the additional fee beyond the period allowed by Law for instituting the suit. His contention was that the present case was a case in which the Court had not held any investigation in the mode prescribed by sections 9 and 10 of Act No. VII of 1870; further that the mistake in the court fee had been the act of the party and not of the Court, and therefore, as it was a case in which the suit had been barred by limitation at the time when the mistake was found out, time could not be given to the plaintiff to remedy the defect. Numerous cases were cited in the course of the argument, practically all of which are referred to in the judgment of the acting Chief Justice.

Mr. *Abdul Majid*, for the respondent, argued that *Jainti Prasad's* case (2) did not apply, as there the plaint was never admitted in court, the office having immediately reported about the deficiency in court fee. In *Balkaran's* case (1) also the

(1) (1890) I. L. R., 12 All., 129. (2) (1893) I. L. R., 15 All., 57.

appeal had not been admitted within the period of limitation. In *Skinner* v. *Ord* (1) it was held that the petition of plaint having been sufficiently stamped as one to sue as a pauper and having been registered as such, the date of institution of the suit should be reckoned from the date of the presentation of the plaint and not from the date of the payment of the court fee. Once a plaint was admitted, section 28 of the Court Fees Act applied, even in the case of a mistake by the plaintiff. Section 9 of the Act simply empowered the Court to issue a commission: it did not take away the powers of the Court given by section 392 of the Code of Civil Procedure. If the Court had not got the power to hold an inquiry itself, there was nothing to be delegated to a Commissioner. Sections 9 and 10 of the Court Fees Act did not limit the inadvertence to the inadvertence of the Court. All the other High Courts had dissented from the rulings in the cases of *Balkaran Rai* and *Jainti Prasad*. The present case was governed by the decisions in *Chedi Lal* v. *Kirath Chand* (2), *Sheo Partab* v. *Sheo Ghulam* (3) and *Musammat Bega Begam* v. *Syed Yusaf Ali* (4).

Munshi *Gokul Prasad* replied.

KNOX, ACTING C. J.—The facts out of which the question raised in this appeal springs are as follows:—

On the 29th of September 1906 the respondent instituted a suit in the Court of the Munsif of Amroha. He asked for a decree declaring his right of pre-emption over (1) a share of certain property which he described as *muafi* with zamindari in Thok Khurd; (2) a share of property described as *muafi* with zamindari together with a proportionate share of *shamlat* land in Patti Khwaja Bakhsh, Thok Kalan, and (3) all rights appertaining to the above-mentioned properties. For the purpose of determining the jurisdiction of the Court, he valued his claim at Rs. 800, which he said was the actual value of the property claimed by him, and he computed the fee payable under Act No. VII of 1870 in accordance with the provisions of section 7, clause (5), paragraph (*c*) of that Act. He stated the nett profits that had arisen from the land during the year next before the date of

(1) (1879) I. L. R., 2 All., 241.
(2) (1880) I. L. R., 2 All., 682.
(3) (1880) I. L. R., 2 All., 875
(4) N.-W. P., H. C. Rep., 1874, 123.

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presenting his plaint as being Rs. 45; he multiplied this sum by fifteen and paid an *ad valorem* fee upon Rs. 675 as set out in Schedule I of the Act. The Munsarim, to whom the plaint was presented, certified that the court fee paid was sufficient, and that the suit had been instituted within the period allowed by the law of limitation of 1877. The plaint was thereupon admitted and registered on the 29th of September 1907.

One of the pleas taken in the written statement was that the court fee paid was insufficient and that the suit was not cognizable by the Court. It was not stated by the defendant why or how the court fee paid was insufficient, nor was it stated what court fee was necessary under the provisions of Act No. VII of 1870.

The Munsif fixed an issue:—"Is the court fee paid insufficient?" Several witnesses were examined touching the point thus raised, and after considering them the learned Munsif found as follows:—"The properties sought to be pre-empted are *muafi* and, therefore, the plaintiff has paid court fee on fifteen times the amount of the income. He puts the income of his properties at Rs. 45, and there is not much difference about that. But it is clear that there is a garden also in the properties in dispute, and the plaintiff has neither given its separate value nor paid any court fee for that . . . . The plaintiff ought to have paid a separate court fee in proportion to his share of the garden claimed, but he has not done so. Besides this there is an income of Rs. 27 from market and *nakhasa* and the plaintiff has not mentioned it also. The plaintiff's witnesses were also compelled to admit that there is some income from market and the *nakhasa*. The patwari puts the income of the market at Rs. 48 per annum, but in my opinion it is somewhat exaggerated. Whatever may be the income from the market and the *nakhasa*, it will not make much difference at the present stage, because the plaintiff has totally ignored it and paid not even a single shell as its court fee. It may be said that the income of the market and the *nakhasa* is included in Rs. 45, but what about his garden? Court fees on groves ought to be paid on their actual price and not on fifteen times the amount of the profits. The plaintiff has given no value of the grove, and, therefore, I hold that the court fee paid by him is not sufficient."

The learned Munsif, though asked, refused to grant time to make up any deficiency in the court fee and dismissed the suit.

In appeal the following pleas were taken :—(1) The court fee paid is sufficient, the net profits of Rs. 45 include the profits from the bazaar, cattle market, &c. ; (2) if in trying the suit the Court came to the conclusion that the court fee paid was insufficient, it should according to law have granted time to the appellant to make good the deficiency.

The learned Subordinate Judge who heard the appeal arrived at no finding upon the question whether the court fee had or had not been rightly computed, or whether or not the profits alleged by the appellants were correct. In his opinion the case was exactly on all fours with the case of *Babu Lal* v. *Asi Kunwar* (1). He held that the Court should have allowed the plaintiff to make good the deficiency, though the time of limitation had expired. He accordingly set aside the decree of the Court below and remanded the case under section 562 for trial on the merits. The pleas taken in this Court were that, as the period of limitation had expired, the deficiency in court fee could no longer be made good, and as there was no valid plaint on the file within the time prescribed by law, the Court of first instance had acted rightly in dismissing the suit.

The learned Judges before whom the case came were of opinion that the appeal should be heard and determined by a Full Bench of this Court, and the question which we have to consider in this case is whether a Court, which, after a suit has been admitted and registered, sees reason to think for any cause that the annual nett profits or the market value of the subject-matter of the claim have been wrongly estimated and thereupon proceeds to hold an inquiry, is bound, if the result of that inquiry shows the estimation to be insufficient, to give time to the plaintiff to pay in the additional fee, whether the time so given be or be not within the time allowed by the law of limitation for bringing the claim, and what is the result if the additional fee be paid within the time fixed by the Court? The learned vakil for the appellant contended that the provisions of section 10 of Act No. VII of 1870 could only be applied to the special class of cases in

(1) (1904) I. L. R., 27 All., 197.

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which the Court has of its own motion issued a commission to a proper person directing him to make an investigation into the amount of annual nett profits or market value of the subject-matter claimed, and not to cases, for instance, in which the Court has held a similar inquiry in person or in which it had arrived without inquiry upon a finding that the fee payable in the suit had been wrongly computed. He further contended that for the last seventeen years, since the Full Bench of this Court had decided the case of *Balkaran Rai* v. *Gobind Nath Tewari* (1), this Court had drawn a sharp distinction between cases in which a document had been presented to a Court without being properly stamped through mistake or inadvertence of the party presenting it and cases in which the document had been through mistake or inadvertence of the Court received by the Court without being properly stamped. To the latter class of cases only had the indulgence allowed by section 28 of the Court Fees Act been granted, and as regards the former class of cases it had been held that the Courts could not give time for paying in the additional fee beyond the period allowed by law for instituting the suit. His contention was that the present case was a case in which the Court had not held any investigation in the mode prescribed by sections 9 and 10 of Act VII of 1870; further that the mistake in the court fee had been the act of the party and not of the Court, and therefore, as it was a case in which the suit had been barred by limitation at the time when the mistake was found out, time would not be given to the plaintiff to remedy the defect.

I shall first deal with the contention that section 10 of Act, No. VII of 1870 comes into play only when the Court has issued a commission under the preceding section to a proper person for the purpose of ascertaining the market value of the nett annual profits of an estate.

It is obvious in the first place that to admit this contention will involve the anomaly that a Court when it delegates its power of investigation to another person enjoys powers which it cannot exercise when it holds the investigation itself, and for this doctrine we know no authority.

(1) (1890) I. L. R., 12 All., 129.

On the other hand, the very fact that a Court is empowered to delegate certain powers to another is of itself proof that the powers thus delegated are powers with which the Court is itself armed.

In the second place an inquiry into the history of sections 9 and 10 of the Court Fees Act shows that there is no foundation for any contention of the kind advanced by the learned vakil for the appellant.

At the time when Act No. VII of 1870 was placed upon the Statute Book the Act which regulated the procedure of Civil Courts was Act No. VIII of 1859. That Act contained a section (section 180) which empowered Courts under certain special circumstances to issue a commission for certain purposes to an officer of the Court, directing him to make an investigation and to report to the Court. The ascertaining of either the market value of property or the nett annual profits of an estate was not one of those purposes. When Act No. VII of 1870 first became law, section 9 stood as it stands now. But section 10 at that time consisted of three clauses and the third clause ran as follows:—

"Section 180 of the Code of Civil Procedure shall be construed as if the words 'the market value of any property or' were inserted after the word 'ascertaining' and as if the words 'or annual nett profits' were inserted after the word 'damages.'"

The object and meaning of this clause is evident. It was that section 180, Act No. VIII of 1859, should be read as part of section 10, Act No. VII of 1870. It empowered Courts in any suit in which the Court might deem a local investigation to be requisite or proper for the purpose of ascertaining the market value of any property or the amount of annual nett profits to issue a commission to a proper officer for the purpose of conducting the necessary investigation and to consider the report of the Commissioner. Upon the repeal of Act No. VIII of 1859, the Codes of Civil Procedure which followed in 1877 and in 1882, contained sections which re-enacted the provisions of section 180, Act No. VIII of 1859, as amplified by Act No. VII of 1870, section 10, clause (iii). They contained also an important addition to the effect (*vide* section 392 of Act No. XIV of 1882) that such commission was only to issue when the investigation deemed necessary by the

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Court could not be conveniently conducted by the Judge in person.

The use of the word "may" in section 10 must not be overlooked. When the section is read with the incorporated section 392 of the Code of Civil Procedure, the obvious inference is that the power of delegation was not to be exercised as a matter of course or on the mere requisition of a party to the suit. On the contrary, the language used shows that the section was framed so as to discourage as much as possible local investigation by a commissioner.

From 1870 onwards clause (iii) of section 10 of Act No. VII of 1870 stood side by side with the amplified section 392 of the Code of Civil Procedure, until in 1891 the Legislature, on going through the Statute Book with the object of removing certain Statutes and portions of Statutes which were spent or had become unnecessary, expunged clause (iii) of section 10 as no longer necessary (Act XII of 1891, Schedule I). This then is the history of sections 9 and 10 of Act No. VII of 1870, and from a study of it we can arrive at the following conclusions, *viz.* :—

(1) As an ordinary rule when a Court considers it necessary to ascertain the market value, &c., of any property the law requires the Court to hold the investigation in person.

(2) Only when such investigation cannot be conveniently held by the Court in person is it to issue a commission to a proper officer to hold the investigation on its behalf.

This being so, I find it impossible to confine the operation of section 10 of Act No. VII of 1870 only to investigations held by a Commissioner. This restricted interpretation is based upon the use of the word "such" in the opening words of section 10, clause (i).

The object of the law may be inartistically expressed, but the intention evidently was to empower Courts to hold inquiry, and it was intended that they should do so preferentially themselves.

To interpret that language, so that if they did hold the inquiry themselves nothing would follow, but that if they held it by deputy most important results in favour of the plaintiff would follow, is contrary to the way in which Revenue Statutes should be interpreted and would lead to an absurdity.

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I prefer the possible and more liberal interpretation that the word "such" is meant to refer to any investigation held under section 9, and that it applies to all investigations, both those held by a Court *per se* and those held *per alium* under its commission, whenever it sees reason to think that the annual nett profits or the market value of any such land, &c., as is mentioned in section 7, paragraphs 5 and 6, have or has been wrongly estimated.

In all such cases, if the estimation is found insufficient, the Court has no option but to require the plaintiff to pay the additional fee payable and to stay the suit until such fee is paid.

I hold then that sections 9 and 10 of Act No. VII of 1870 govern all cases in which a Court may think it necessary to hold an inquiry into the market value of or the annual nett profits arising out of the property, the subject-matter of the claim, and whether that inquiry be by evidence taken on an issue raised by the defendant or by a local investigation held in person or by commission or otherwise.

But the next contention is that the Court can under section 10 stay the suit only for such period, if any, as may remain unspent of the period prescribed by the Limitation Act of 1877 as the period within which the particular suit can be brought.

This contention is not based upon any words or expressions contained in Chapter III of Act No. VII of 1870. There are no direct or indirect words of limitation contained in either section 9 or 10. If we read them as they stand and without reference to any Act or precedent, the powers given in them can be exercised at any time up to the passing of the decree in a suit. There is also no limitation in section 392 of Act No. XIV of 1882, which must be read with these sections.

The contention is based upon the line of reasoning contained in the judgment delivered by the learned Chief Justice Sir John Edge in *Balkaran Rai* v. *Gobind Nath Tewari* (1), and adopted by the other four learned Judges of this Court who sat with him to hear and determine that appeal. Briefly put that reasoning is that—

(i) The law, section 6 of Act No. VII of 1870, prohibits a Court from receiving, filing or using a plaint unless that plaint

(1) (1890) I. L. R., 12 All., 129.

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has affixed to it a court fee of the proper value required by Act No. VII of 1870.

(ii) If the period prescribed by limitation does expire before such court fee is affixed, the plaint, when the court fee is affixed after that period has elapsed, is a plaint to the hearing of which limitation is a bar, or, to put it in another form, that there will be in this last mentioned case "no valid suit as to the merits of which the Court can give a decision."

(iii) It is only in those cases where an order can lawfully be made under section 28 of the Court Fees Act that the principle of *nunc pro tunc* can be applied and the plaint treated as if it had been properly stamped in the first instance.

Beyond all doubt any line of reasoning which found favour with the Judges who decided *Balkaran Rai* v. *Gobind Nath Tewari* is entitled to great respect and consideration. But it must always be remembered in considering *Balkaran Rai's* case that the conclusion arrived at in *Balkaran Rai* v. *Gobind Nath Tewari* is the opposite of that arrived at by the Full Bench of this Court in another case, *Chedi Lal* v. *Kirath Chand* (1). The view that found favour with the Judges in the case first named was put forward by the learned vakil for the appellants in the latter case, but the learned Judges held unanimously that "if a document which ought to bear a stamp under the Court Fees Act has been used in the High Court, and the mistake or inadvertence, which permitted its reception in a lower Court without being properly stamped, comes to light in the High Court, any Judge of that Court may, under section 28 of the Court Fees Act, direct that it should be properly stamped." Further that "when a proper order has been made and carried out, the original mistake and inadvertence and all subsequent consequences of such mistake or inadvertence are cured."

In *Balkaran Rai's* case, as the learned Chief Justice pointed out at page 147 and again at page 150, "sections 10 and 11 of the Court Fees Act relate to suits and do not relate to appeals." *Balkaran Rai's* case was the case of a memorandum of appeal which had been insufficiently stamped and the force and value of sections 9 and 10 was not in question.

(1) (1889) I. L. R., 11 All., 628.

Apart, however, from these considerations, and with the utmost respect to the Judges who decided that appeal, I find myself unable to follow them when they make Act No. VII of 1870, which is an Act dealing with purely fiscal matters, and the main object and intent of which is to prevent the Government being defrauded of the fees prescribed by it, act and react upon the Indian Limitation Act of 1877. The law upon the subject of stamps is altogether, says Taunton, J., in *Morley* v. *Hall* (1), "*positivi juris*, it involves nothing of principle or reason, but depends entirely upon the language of the Legislature." In interpreting Act No. VII of 1870 the safest canon of construction is perhaps that very lately laid down by Lord Russell, Chief Justice, in *Attorney General* v. *Carlton Bank* (2), *viz.* "to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed." To introduce limitations from other Acts, when no such limitations are even suggested in the context, is in so many words to legislate. Looking only at the Act and the context in which the sections of the Act which we have to construe stand, we shall find that section 6 did intend that a plaint was not to be received in any Court of Justice unless the court fee prescribed by the Act had been paid upon it. The Legislature, however, foresaw that plaints may and will be received about which a doubt will arise and regarding which inquiry will show that the whole of the court fee prescribed has not been paid. They thereupon enacted sections 9 and 10 giving a Court power to remedy the defect and to carry out the intention and object of the Act that the Revenue shall not be defrauded and that the full court fee shall be paid before the hearing is further proceeded with, whatever be the stage at which the hearing may have arrived when the mistake is detected. I cannot bring myself to believe, as I have to do if I adopt the contention now under consideration, that the Legislature ever intended that a Court should say to a plaintiff:—"I will not proceed further with the case until you pay the requisite court fee," and that, when the fee had been realized, should then and there say to the plaintiff:—"Your suit is

(1) (1834) 2 Dowl., 494. (2) [1899] 2 Q. B., 184.

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dismissed, because the deficient court fee has not been paid in till after the period of limitation had expired." To any such proceeding on the part of a private individual we should attach the stigma of fraud.

Besides, even if the Statute of Limitation is to be in any way woven into this Act, and in the absence of clear words for that purpose I am not prepared so to hold, what does that Statute say? This, too, is a Statute which places restraint upon the rights of individuals and has to be construed in the light derived from its own text and not by the aid of any light borrowed *aliunde*. It runs as follows:—"Every suit (section 4) instituted after the period of limitation prescribed therefor, shall be dismissed." Then follows an explanation showing what is meant by the word "instituted." When a plaint is presented to the proper officer (Act No. XV of 1877, section 4, explanation), the suit in which it is the plaint is instituted. No words are used to qualify the word "plaint" and to say that it must be a plaint stamped in accordance with the provisions of Act No. VII of 1870, section 6.

When the plaint, whatever its defects, is presented to the proper officer, the suit is then and there instituted, and once it has been instituted within the time prescribed, the suit escapes from the bar of limitation, unless such bar be one in existence prior to institution. What right have we to add in Act No. XV of 1877, section 4, the words "sufficiently stamped" to the word "plaint?" See *Musammat Begi Begum* v. *Syed Yusaf Ali* (1).

So again, if it had been intended that the question of limitation should enter into section 10, clause (ii), I should expect to find the words "subject to the provisions of the Law of Limitation" inserted into it.

The metaphor used by the learned Chief Justice at page 142 of the report of *Balkaran Rai* v. *Gobind Nath Tewari* has been in my opinion extended by him too far. He says:—"In my opinion an appeal cannot be said to be presented within the meaning of section 4 of the Indian Limitation Act, 1877, when the only presentation of the appeal is the tendering to the Court of a document, which the Legislature has specifically enacted

(1) N.-W. P., H. C., Rep., 1874, 139.

shall not be regarded by a Court as of any validity, and the tendering to my brother Brodhurst on the 9th November 1877 of a document which the law says shall be regarded as of no validity, was no more a presentation of an appeal than would the tendering to him of a blank piece of paper have been a presentation of an appeal. In one case he could see nothing on the paper, in the other case the law had forbidden him to see anything on it."

But is it correct to say that the law has forbidden him to see anything on it? He must see all or nearly all that has been written on it before he can judge whether the proper court fee has been paid. He may receive it, register it, and then, if a doubt arises upon this matter, he will have to examine it very carefully and make that very paper the basis of an investigation.

I, therefore, see no necessity for going outside and beyond the plain words contained in sections 9 and 10, or indeed for praying in aid section 28, which belongs to the Chapter in the Act which deals with the mode of levying fees. The suit has been instituted within time, the King's fee for hearing the suit has been realized and the suit stayed can proceed. Even if the fee is not paid, the suit is dismissed, but the plaint is not taken off the file. It will remain received and filed until the record or the portion of the record containing it is destroyed.

Section 28 is a universal section and embraces a far wider area than sections 9 and 10. It applies to all cases in which any document is through mistake or inadvertence received, filed or used in any Court without being properly stamped, and is useful in putting still further beyond doubt the validity of a plaint stamped either under section 10 or section 28 of the Act.

It opens with the very positive words:—"No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped."

But those words can only refer to what is to happen after it has been discovered that a plaint has been insufficiently stamped. No one would contend that after a suit had been fought to the end and a decree obtained from the highest tribunal, and the decree executed, that then, if it be discovered that the plaint has

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not been properly stamped, the whole proceedings can be attacked on the ground that the plaint had no validity, as it can be where fraud is discovered. If the mistake is discovered before decree, the plaint has no validity unless and until it is properly stamped and the suit cannot proceed one step further.

But assuming that section 28 is in any way needed to complement and complete section 10, it is contended further that section 28 applies only when the document, *i.e.* the plaint in this case, has been received by mistake or inadvertence of the Court. The answer to this contention comes out of the same quiver that provided the arrow of contention. I find at page 147 the learned Chief Justice saying :—"The application of section 28 would not be inconsistent with the provisions of section 10 or section 11. Cases coming within section 10 or section 11 of the Court Fees Act would arise only where through mistake or inadvertence of the Court a plaint, which subsequently was discovered to be insufficiently stamped had been received, filed or used in the Court. No such Court would knowingly receive, file or use a plaint which was insufficiently stamped in contravention of the express prohibition of section 6 of the Court Fees Act." The logical deduction from this is :—Therefore every document so received is received by mistake or inadvertence of the Court. The mistake may in its origin be the mistake of the plaintiff; by the time the plaint has been registered, the mistake has become the mistake of the Court. If the Court or the Munsarim discover the plaintiff's mistake before registration of the plaint, the plaint would at once be rejected under section 54 of the Code of Civil Procedure and never registered at all.

I hold, therefore, that section 28 is subject to no such limitations as are contended for. When it has been discovered at any time that through mistake or inadvertence a plaint has been filed on an insufficient court fee stamp, any Judge who discovers the mistake can at any time and without any regard to limitation have the proper court fee made up, and that when it is so made up, the plaint is valid as if it had been properly stamped when presented.

In this view it is really immaterial to consider whether when a mistake is discovered after registration there has been any mistake on the part of the plaintiff.

I was first impressed by the contention that if there be nothing in the plaint to put the Court or the Munsarim of the Court on its or his guard there can be no mistake or inadvertence so far as the Court or Munsarim is concerned. But what is a mistake? It is not mere forgetfulness, it is a slip, made not by design but by mischance—Esher, M. R., in *Barrow* v. *Isaacs* (1), Russell, C.J., in *Sandford* v. *Beal* (2) and "mistake or inadvertence" as interpreted in *Doe dem Blewitt* v. *Phillips* (3).

But I find on examining most of the cases cited in this behalf that the mistake held to be that of the plaintiff might reasonably be held to be the mistake of the Court. Thus *Muhammad Ahmad* v. *Muhammad Sulaiman* (4) was a case in which the plaintiff made an arithmetical mistake in calculating the net profits. It appears from the judgment that the officer of the Court, when he checked the plaint, could, if he had gone over the plaintiff's calculation, have discovered the mistake. I am unable to hold with the learned Judges who decided that case that it was not the duty of the Munsarim to check the plaintiff's calculation. Rule 12 of the Rules and orders of the 4th of April 1894 lays down:—"A Munsarim of a Civil Court appointed to receive plaints shall examine each plaint presented to him, and shall report thereon whether the provisions of Acts Nos. VII of 1870 and XIV of 1882 have been observed, and whether the claim is within the jurisdiction of the Court and has been presented within the period prescribed for the institution of such a suit." There was certainly material which, if examined, would have put him on his guard. It is not the intention of the law or of the Rules of the Court that a munsarim's inquiry should be a piece of perfunctory routine. It seems to me that if ever a plaint was received by the mistake and inadvertence of the Court, the plaint in this case was so received, and that section 28 of the Court Fees Act did apply, even if its application hangs upon a mistake by the Court.

In *Chatarpal* v. *Jagram* (5) the learned judges followed, and apparently unwillingly, the ruling just cited.

(1) (1891) 1 Q. B., 417.
(2) (1895) 65 L. J. Q. B., 74
(3) (1841) 1 Q. B., 96.
(4) (1901) I. L. R., 23 All., 428.
(5) (1905) I. L. R., 27 All., 411

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In *Ram Tahal Singh* v. *Dulari Rai* (1) the mistake was not discovered till the case had gone into appeal, and the mistake however it arose, was, it seems to me, the mistake of the Court. The Munsarim of Azamgarh must know that a large number of villages in that judgeship are permanently settled and should have been on his guard. One question to the plaintiffs would have discovered the defect.

The case of *Dibrarar Hussain* v. *Bhagwat Das* (2) is the case of a memorandum of appeal insufficiently stamped and is, therefore, distinct from the present case.

The cases of *Babu Lal* v. *Asi Kunwar* (3), *Chunni Lal* v. *Ajudhia Prasad* (4), *Ghasi Ram* v. *Har Gobind* (5), *Hasibul-nissa* v. *Ghafur-ullah Khan* (6) and this last is the judgment of a Full Bench of this Court, which were relied upon by the learned counsel for the respondents, follow the principles laid down in this judgment and have been in my opinion rightly decided.

The learned vakil for the appellants, Munshi *Gokul Prasad*, to whom we are indebted for a very careful and very exhaustive argument in the case, drew our attention to the Full Bench Ruling of this Court in *Jainti Prasad* v. *Richu Singh* (7). But in that case the Court had to deal with a plaint in which the mistake was discovered before the plaint was registered. That is a case quite distinct from the one before us and provided for by section 51 of the Civil Procedure Code. It was dealt with under that section, and all that we are concerned with in it is that sections 9 and 10 of the Court Fees Act, 1870, were held not to apply. If that was a correct decision it manifestly has nothing in common with the present case, in which I hold sections 9 and 10 of the Court Fees Act were rightly applied.

I, therefore, hold that when a plaint has been registered and a Court, having reason subsequently to think that the market value or nett annual profits of the subject-matter of the claim has been wrongly estimated, holds an inquiry either *per se* or through a Commissioner appointed for the purpose, and finds that a sufficient court fee has not been paid, it is bound to stay the suit and

(1) (1906) I. L. R., 28 All., 310.
(2) Weekly Notes, 1907, p. 63.
(3) (1904) I. L. R., 27 All., 197.
(4) (1897) I. L. R., 19 All., 210.
(5) Weekly Notes, 1907, p. 18.
(6) (1907) I. L. R., 29 All., 382.
(7) (1893) I. L. R., 15 All., 65.

to fix a time within which the additional fee can be paid, without any regard to the fact whether that be a time within or beyond the period of limitation prescribed for the suit. If the fee is paid within the time so fixed, the plaint is as valid as if it had been properly stamped in the first instance on the day when the suit was instituted. The lower appellate Court in the present case should have arrived at and recorded a definite finding on the first issue raised in the appeal before it, *viz.* whether or not the subject-matter of the suit had been rightly valued and the proper court fee affixed. If it finds that the proper court fee was affixed, it will remand the suit under section 562 of the Code of Civil Procedure for decision on the merits. If it finds that the court fee has been undervalued, it will state what it finds to be the proper market value and the proper amount of the nett profits and will remand the case to the first Court with a view to its taking action as prescribed in section 10, clause (ii) of the Court Fees Act.

The appeal is so far decreed that the order of the lower appellate Court is set aside upon the preliminary point and the appeal is remanded to that Court with directions to readmit the appeal upon its file of pending appeals and to determine it upon its merits in accordance with what has been set out above. Each side will bear its own costs in this Court.

BANERJI, J.—This appeal arises in a suit for pre-emption which was dismissed by the Court of first instance. The lower appellate Court has set aside the decree of that Court and has remanded the case. From this order of remand the present appeal has been lodged.

The property claimed is a third share of certain *muafi* and zamindari and was valued for purposes of court fees, under section 7, clause (v), sub-clause (*c*) of the Court Fees Act, on fifteen times the nett profits, which the plaintiff stated to be Rs. 45. The officer of the Court reported that the plaint was sufficiently stamped, and it was admitted and entered in the register of civil suits. The defendant in his written statement took the plea, among others, that the plaint was not sufficiently stamped. Thereupon the Court framed the issue:—"Is the court fee paid insufficient?" It took evidence and came to the conclusion that

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the profits of the property had been under-estimated by the plaintiff, and that the court fee paid was insufficient. It did not declare the amount of the deficiency and it did not require the plaintiff to make it good, but dismissed the suit on the ground that on the date on which it found the amount of court fee to be insufficient, the period of limitation for the institution of a suit for pre-emption had expired. The correctness of the finding of the Court of first instance was impugned in the appeal preferred by the plaintiff to the lower appellate Court, but that Court came to no conclusion on the point, and relying on the ruling of this Court in *Babu Lal* v. *Asi Kunwar* (1) remanded the case to the Court of first instance. The learned vakil for the appellants has addressed to us a very able argument and has laid before us all the rulings of this Court on the point. He contends that sections 9, 10 and 28 of the Court Fees Act should be read together; that section 9 only applies to cases in which the Court takes action of its own motion; that section 10 applies to those cases only in which a commission has been issued by the Court under section 9, and that under section 28 additional court fees can only be received in cases in which a document insufficiently stamped has been received through the mistake or inadvertence of the Court or its officer. He relies on the judgment of the Full Bench in the case of *Balkaran Rai* v. *Gobind Nath Tewari* (2). In that case the learned Chief Justice Sir John Edge, whose judgment was concurred in by the other learned Judges, held that "the mistake or inadvertence in section 28 must mean mistake or inadvertence on the part of the Court or its officer, and not mistake or inadvertence on the part of an appellant or his advisers." In so holding the learned Chief Justice read into the section words which found no place in it. On the strength of this ruling it has been held in several cases that a distinction must be made between the "mistake or inadvertence" of the Court or its officers and that of a party. As to what constitutes a mistake or inadvertence on the part of the Court or its officers, the rulings are not very consistent. It was held, for example, in *Muhammad Ahmad* v. *Muhammad Siraj-ud-din* (3) that the omission

(1) (1904) I. L. R., 27 All., 197. (2) (1889) I. L. R., 12 All., 129.
(3) (1901) I. L. R., 23 All., 423.

of the Munsarim to detect an arithmetical error in the plaint was not a mistake or inadvertence on the part of that officer, a view which in my opinion it is impossible to agree with. In all these cases a very important part of the judgment in the case of *Balkaran Rai* does not appear to have been duly considered. In deciding the question whether section 28 was inconsistent with the provisions of section 9 or section 10 of the Court Fees Act the following observations were made by the learned Chief Justice at page 147 : — "The application of section 28 would not be inconsistent with the provisions of section 10 or section 11 (he evidently meant section 9 or section 10). Cases coming under section 10 or 11 of the Court Fees Act would arise only where through mistake or inadvertence of the Court a plaint which subsequently was discovered to be insufficiently stamped had been received, filed or used in the Court. No such Court would knowingly receive, file or use a plaint which was insufficiently stamped, in contravention of the express prohibition of section 6 of the Court Fees Act." It is clear from the above remarks that the learned Judges held in that case that when, after a plaint has been received and admitted, it is discovered to have been insufficiently stamped, the plaint must be deemed to have been received, filed or used through the mistake or inadvertence of the Court, and section 28 would apply. This is further manifest from the following passage in the judgment of the Full Bench in the later case of *Jainti Prasad* v. *Bachu Singh* (1) : — "No doubt cases do occur in which after the plaint has been admitted and has been brought upon the file, which we understand to mean registered, it is discovered that the stamp is not sufficient, and that the plaint has been received and filed through inadvertence or mistake on insufficiently stamped paper. In the latter case upon the plaint being properly stamped in accordance with an order of the Court under section 28 of the Court Fees Act, the plaint would be as valid as if it had been properly stamped in the first instance and consequently would remain with its original date on the file of the Court." According to these rulings, therefore, section 28 will apply to cases in which a plaint has been admitted and is subsequently found to have been insufficiently stamped.

(1) (1893) I. L. R. 15 All., 65, at p. 78.

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The same result arises from a consideration of sections 9 and 10. Under the former section the Court is empowered to make an investigation, "if it sees reason to think that the annual nett profits or the market value . . . . . have or has been wrongly estimated." And section 10 directs that if the Court finds that the nett profits or the market value have or has been wrongly estimated and the estimation has been insufficient it shall require the plaintiff to pay additional fees within a time to be fixed, staying the suit until the additional fee is paid; and it is only when the plaintiff fails to pay the additional fee that the suit should be dismissed. It necessarily follows that when the additional fee has been paid the Court will proceed with the suit as if the plaint had been validly stamped when presented. There is nothing in section 9 to indicate that the action which the Court may take under it must be of its own motion and not upon objection raised by the defendant, and that the Court cannot take proceedings under it at any stage of the suit. The language of the section is wide enough to enable a Court to hold an investigation whenever it has reason to think that an error has been committed in the valuation of the suit for purposes of court fees. The whole scope of the Court Fees Act shows that it is the duty of the Court to ensure payment of the stamp revenue, and for this purpose the Court may make an investigation either of its own motion or on being moved by a party to the suit. And it seems to me that it was intended by the Legislature that when the proper amount of the revenue has been realized in accordance with the provisions of the Act, the document which had been insufficiently stamped becomes perfectly valid. I am unable to agree with Mr. *Gokul Prasad's* contention that the Court itself cannot hold an investigation under section 9, but must issue a commission, and that it is only when a commission has been issued that section 10 applies. The provisions of the Court of Civil Procedure were made applicable to such an investigation by clause (iii) of that section, which has since been repealed by the general Repealing Act of 1891, as section 392 of the present Code of Civil Procedure (Act XIV of 1882) distinctly provides for the issue of a commission for the purpose of ascertaining the annual nett profits of the property in dispute. Under section 392 a commission to make

a local investigation may be issued if the investigation "cannot be conveniently conducted by the Judge in person." Further, as the learned Acting Chief Justice has pointed out, the power of delegation of authority necessary implies existence in the Court of the authority which it delegates. It is clear, therefore, that an investigation may be made under section 9 of the Court Fees Act by the Court itself, and I see no valid reasons for holding that section 10 does not apply when such an investigation has been made. In my opinion section 10 is applicable to a case like the present, and I agree with the ruling in *Babu Lal* v. *Asi Kunwar* (1). In *Jainti Prasad* v. *Bachu Singh* (2), the error was detected at the time of the presentation of the plaint and before its admission. That case is, therefore, distinguishable, and it is unnecessary for me to say whether or not I agree with the ruling in that case. In my judgment, whether we apply section 28 or section 10, when after the admission of a plaint a deficiency in court fees is discovered and the amount of the deficiency is made good in compliance with an order of the Court, the plaint becomes as valid as if it had been properly stamped when first presented. In this view it is unnecessary to discuss the various rulings cited at the hearing. In the present case the Court of first instance should, in my opinion, have allowed the plaintiff to supply the deficiency in fees, if there was any, and no question of limitation arose. I agree in the order proposed.

BURKITT, J.—I concur in the order proposed by the learned officiating Chief Justice and in the reasons by which it is supported.

RICHARDS, J.—The facts and circumstances connected with this appeal have been fully stated by the learned acting Chief Justice in the able and exhaustive judgment he has just delivered, and it is quite unnecessary for me to refer to them. It seems to me that the whole difficulty in the case has arisen from the application by this Court of the ruling in the case of *Balkaran Rai* v. *Gobind Nath Tewari* to plaints There a memorandum of appeal was presented to the High Court insufficiently stamped and a Full Bench held that, because limitation had expired before the deficiency was made good, the Court had

(1) (1904) I. L. R., 27 All., 197. (2) (1833) I. L. R., 15 All., 65.

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no power to give time to the appellant to make good the deficiency, notwithstanding the provisions of the Court Fees Act, 1870. As pointed out by the Acting Chief Justice, the decision in *Balkaran Rai* v. *Gobind Nath Tewari* was contrary to the view of another Full Bench of the Court in *Chedi Lal* v. *Kirath Chand* (1).

In *Balkaran Rai* v. *Gobind Nath Tewari* the Court had before it an insufficiently stamped memorandum of appeal, and it decided that, because the insufficiency of the stamp was not due to the mistake or inadvertence of the Court, there was no power under section 28 of the Court Fees Act to allow the deficiency to be made good. In course of his judgment the learned Chief Justice points out that sections 9 and 10 of the Court Fees Act, 1870, relate to suits and not to appeals, and from the remarks of the Chief Justice at page 147 of the report it would appear to have been his view that, whenever an insufficiently stamped plaint is admitted, the plaint must be deemed to have been admitted through the mistake or inadvertence of the Court or office. The manifest hardship of the decision in *Balkaran Rai* v. *Gobind Nath Tewari* led to the introduction of a new section (582A) into the Code of Civil Procedure, and it is now expressly provided by that section that if a memorandum of appeal has been presented within the proper period of limitation, but is written on paper insufficiently stamped and the insufficiency of the stamp was caused by a mistake on the part of the appellant as to the amount of the requisite stamp, the memorandum of appeal shall have the same effect and be as valid as if it had been properly stamped.

There can be no doubt that the introduction of section 582A was due to the decision in *Balkaran Rai* v. *Gobind Nath Tewari*. It was apparently unnecessary to make a similar amendment of the law in respect of insufficiently stamped plaints, because the judgment of the Court was expressly confined to memoranda of appeal. Strange to say, notwithstanding that the Legislature had stepped in to remove the hardship of the decision in *Balkaran Rai*, this Court has in a number of cases extended the doctrine of the decision to cases of insufficiently stamped

(1) (1889) I. L. R., 11 All., 528.

plaints and seems to have altogether overlooked the fact that the learned Chief Justice had expressly confined his judgment to memoranda of appeal. The result has been a most unsatisfactory state of affairs, which calls loudly for reconsideration. There may, of course, be cases where plaintiffs wilfully undervalue their claim, but the Legislature has made many provisions for the protection of the revenue. On the other hand a mistake in the court fee is often (as in the present case) a perfectly honest and excusable mistake. The question as to what is the proper stamp is frequently a very difficult one. Sometimes the question depends upon information which the plaintiff does not possess and cannot reasonably be expected to possess when he institutes his suit. Very often a difficult question of law is involved, capable of lengthy arguments on both sides. According to some of the recent rulings of this Court, if a plaintiff makes a mistake as to the stamp no matter how honest or how excusable the mistake may be, his suit must be dismissed unless he can show that the Court or office also made a mistake. On the other hand, the mistake of the plaintiff, no matter how grossly careless, is apparently cured if he can only show that the Court or office made a mistake also. Litigants and their advisers can never be certain how the Court will decide the question of "mistake of the office." It is a mixed question of law and fact and every Court more or less takes its own view of the matter.

A number of cases were cited during the argument as to what was a mistake of the Court and what was exclusively a mistake of the party. I am inclined to think that this present Bench would not have been unanimous in any one of them. I find it impossible to reconcile many of these cases: for example, compare the case of *Chatarpal* v. *Jagram* (1) with the case of *Hasibul-nissa* (2). Second Appeal No. 923 of 1906, decided on 16th July last, was cited by Mr. *Gokul Prasad*. In that case the plaintiff omitted to count for the purpose of the stamp on his plaint a quarter of a pie supposed to be payable to Government for revenue. His suit was dismissed on the ground that he had made a mistake. More than one of the Judges of this Bench, from their remarks during the argument, would seem to think that the plaintiff in

(1) (1904) I. L. R., 27 All., 411. (2) (1907) I. L. R., 29 All., 382.

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that case made no mistake in omitting from his calculation the quarter pie, that the Munsarim made no mistake in admitting the plaint and that the fee paid was the correct fee. Second Appeal No. 923 of 1906 is not before us, and I do not now refer to it for the purpose of saying whether the fee paid was or was not correct. I refer to the case to illustrate how inconvenient and unsatisfactory it would be if the dismissal of a suit (where the plaint has been admitted) were to depend upon the view the Court took as to whether or not the alleged deficiency was due to the mistake or inadvertence of the plaintiff exclusively, to the mistake or inadvertence of the Court or office or to the mistake or inadvertence of both. The unsatisfactory state of the authorities on this question has led to an immense amount of unnecessary litigation, which, we hope, will end with our decision in this case. I entirely agree with the learned Acting Chief Justice in holding that in all cases in which after the plaint has been presented and admitted within limitation and the Court afterwards finds that the annual nett profits or the market value of the property mentioned in section 9 of the Court Fees Act, 1870, have been wrongly estimated, the Court is bound to fix a date within which a plaintiff is to make good the deficiency, and if the deficiency is made good within that time, the suit cannot be dismissed on the ground that the deficiency was not made good within the time prescribed for instituting the suit. I concur in the proposed order.

DILLON, J.—I have had the advantage of perusing the elaborate and learned judgment of the Acting Chief Justice, and I agree with him in the conclusions at which he has arrived, and have nothing to add to the reasons which he has given for arriving at those conclusions.

BY THE COURT.—The order of the Court is that, the order of the lower appellate Court having been set aside upon the preliminary point, the appeal is remanded to that Court with directions to readmit it upon its file of pending appeals and to determine it in accordance with what has been set out in the judgments of this Court. Each side will bear its own costs in this Court.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

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August 14.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Dillon.

DHARAM DAS (DEFENDANT) v. GANGA DEVI (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 (*Indian Limitation Act*), *sections* 19 *and* 20, *schedule II, articles* 59 *and* 60—*Limitation—Suit to recover money deposited on current account—Loan—Deposit—Acknowledgment.*

Held that a suit to recover money deposited with a banker on a current account is governed as to limitation by article 59, and not by article 60, of the second schedule to the Indian Limitation Act, 1877. *Pearay Lal* v. *Elizabeth Berkeley* (1) followed

In order that an acknowledgment of a debt should be effectual to save limitation under section 19 of the Indian Limitation Act it must be signed by the person to be bound thereby.

Similarly a part payment of the principal of a debt must appear in the hand-writing of the person making the part payment and not in that of any other person, however authorized

Held also that the mere crediting of interest in a banker's books cannot be regarded, for the purpose of saving limitation, as equivalent to a payment of interest.

THIS was a suit brought by the widow of one Niadar Singh against the sons of one Paras Das, a banker carrying on business at Saharanpur, Simla and elsewhere to recover a sum of Rs. 5,520-15-9 under the following circumstances. The plaintiff alleged that her husband at various times between the 24th of December 1896 and the 24th of May 1902 had deposited money in Paras Das' bank at Simla, and that it was agreed that he was to receive interest at the rate of 6 annas per cent. per mensem on such deposits. It was also agreed that the principal and interest should be payable on demand. This course of dealing continued until the 2nd December 1901, the plaintiff's husband operating on the account thus opened, and the last withdrawal of money was on the 24th May 1902. The plaintiff further alleged that the account used to be balanced once a year, and that a balance of Rs. 5,520-15-9 was due to her up to the 8th January 1905. Practically the suit was contested only by Dharam Das, defendant No. 1, whose defence was that the money was paid as a loan and not as a deposit, and that the claim was therefore

* First Appeal No. 240 of 1905 from a decree of Babu Nihala Chandra, Subordinate Judge of Saharanpur, dated the 7th of August 1905.

(1) F. A. No. 96 of 1882, decided on the 4th April 1885.

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barred under article 59 of the second schedule to the Indian Limitation Act 1877. The court of first instance (Subordinate Judge of Saharanpur) decreed the plaintiff's claim in full, holding that the moneys paid by Niadar Singh to Paras Das were deposited within the meaning of article 60 of the second schedule to the Indian Limitation Act, and that as the plaintiff had demanded payment on the 7th of September 1904 and instituted the suit on the 10th of January 1905, the suit was well within time. The defendant Dharam Das appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, Babu *Satya Chandra Mukerji* and Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *B. E. O'Conor* and Babu *Durga Charan Banerji*, for the respondents.

KNOX, ACTING C.J. and DILLON, J.—This appeal arises out of a suit brought by the plaintiff respondent to recover Rs. 5,520-15-9 under the following circumstances:—

The plaintiff is the widow of one Niadar Singh and the defendants are the sons of one Lala Paras Das. The plaintiff's case is that Paras Das was a banker carrying on business at Saharanpur, Simla and various other places, and that as a banker he used to receive moneys by way of deposit, on which interest was paid or not paid, according to the agreement in each particular case; that her husband at various times between the 24th December 1896 and the 24th of May 1902 deposited money in the defendant's Bank at Simla, and that it was agreed that he was to receive interest at the rate of annas 6 per cent. per mensem on such deposits. It was also agreed that the principal and interest was payable on demand. That this course of dealing continued until the 2nd December 1901, the plaintiff's husband operating on the account thus opened, and that the last withdrawal of money was on the 24th May 1902. The plaintiff further alleged that the account used to be balanced once a year, and that a balance of Rs. 5,520-15-9 was due to her up to the 8th of January 1905. The suit was practically only contested by Dharam Das, defendant No. 1, whose defence was, *inter alia*, that the money was paid as a loan and not as a deposit, and that the claim is, therefore, barred by article 59 of the Limitation Act of 1877. Badri Das, defendant No. 2, merely stated that the debt, if recoverable

at all, was recoverable from the defendant No. 1, as under a partition made between the sons of Paras Das, the money due to the plaintiff was payable by Dharam Das. Janeshri Das, defendant No. 3, made no defence. The lower Court decreed the claim in full, holding that the moneys paid by Niadar Singh to Paras Das were deposited within the meaning of article 60 of the Limitation Act, and that the plaintiff having demanded payment on the 7th of September 1904, and her suit having been instituted on the 10th of January 1905, her claim was amply within time. The arguments which were addressed to us by both sides at the hearing of this appeal turned entirely on the question of limitation.

For the appellant it was contended that in enacting the two articles in question, the Legislature intended to make a wide distinction between loans and deposits; that the transactions in this case amounted to loans made by Niadar Singh to Paras Das, and that, therefore, article 59, and not article 60, was applicable. For the respondents it was contended that, though the moneys advanced were undoubtedly loans in one sense of the word, they were none the less deposits within the meaning of article 60, inasmuch as Paras Das received them in the capacity of a banker; that article 59 was meant to apply to ordinary borrowers, but had nothing to do with bankers and their customers, that a banker is on a totally different footing to a private person, inasmuch as he creates a special confidence in himself by holding out that he is a person of substance and solvent. Mr. *O'Conor*, for the respondent, further urged that in any case the suit was not barred by reason of the entries in the appellants' books to be found at p. 33 R. These are:—

1. Certain entries relating to be debt due to Niadar Singh in the lists prepared and filed in suit No. 96 of 1903, in the Court of the Subordinate Judge, which was a suit between the defendants, the sons of Paras Das, for partition after their father's death.

2. An entry in the defendants' books on the 11th of October 1902 showing a balance in favour of Niadar Singh.

3. A credit of interest in Niadar Singh's account on the same date, and

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4. A payment of rent on Niadar Singh's account to Durga Gir Goshain on the 24th of May 1902.

These entries, the learned counsel claimed, had the effect, the two former under section 19, and the two latter under section 20 of Act XV of 1877, of extending the period of limitation.

Upon these arguments it will be seen that the following points arise for consideration and determination in this appeal:—(1) Does article 59 or article 60 apply to this case? (2) If article 59 applies, what effect have the entries above mentioned upon the question of limitation?

We accordingly proceed to consider point No. 1 as above set forth. In this connection it is necessary, in order to clear the way, to consider in what mode money is usually advanced to bankers by their customers, and what these transactions are called in banking parlance.

So far as we know, money is usually received by bankers in one of two ways. They are:—

(1) Advances which are repayable on demand and which are credited to the floating or current account of the depositor, and (2) advances which are not repayable till the expiration of a fixed period, and which are usually "fixed deposits." The former do not usually carry interest, the latter always do.

Under which of the above categories would Niadar Singh's dealings with Paras Das fall?

There can be no doubt, we think, on the evidence, that the repayments he made were credited to his current account with Paras Das' firm. What then are the relations between a banker and his customer in regard to the latter's current account?

Are they the same as between an ordinary borrower and lender: or do they stand on a totally different footing, partaking of a somewhat fiduciary character, as contended for the respondents?

So far as the English Courts are concerned the point is concluded by the decision in the case of *Foley* v. *Hill* (1). In that case it was held that the relation between a banker and a customer who pays money into his bank is the ordinary relation of debtor and creditor, with a superadded obligation arising out of

(1) (1848) 2 H. L. C., 28.

the custom of bankers to honour the customer's drafts, and that the relation of banker and customer does not partake of a fiduciary character. That case has been referred to as being the law on the subject by the English Courts in the following cases :—*Pott* v. *Clegg* (1), *In re Agra Bank* (2), *In re Tidd* (3) ; and see also *Bridgman* v. *Gill* (4).

But in the case before us we have to consider whether the Indian Legislature, having, as we must presume they had, the above rulings present to their minds, in enacting article 60 of the second schedule of the Limitation Act, intended to place transactions between a banker and his customers on a different footing from that on which they had been placed by the English Courts. If that was their intention, then it is manifest that the plaintiff's suit must succeed ; otherwise it must fail. As to the construction to be placed on the articles in question we were referred by the counsel on both sides to a number of authorities in support of their respective contentions. The learned counsel for the appellants relied upon the following cases :—*Hingun Lall* v. *Debee Pershad* (5), *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (6), *In the matter of T. Agabeg* (7), *Ichha Dhanji* v. *Natha* (8), *Chandu* v. *Chanda Mal* (9), and on an unreported case in this Court, *Piyare Lal* v. *Elizabeth Berkeley* (10). On the other side we were referred to *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (11), *Perundevitayar Ammal* v. *Nammalvar Chetti* (12), *Administrator-General of Bengal* v. *Kristo Kamini Dassee* (13) and *Dorabji Jehangir Randiva* v. *Muncherji Bomanji Panthaki* (14).

We have carefully considered the two articles in question by the light of these rulings. It is far from easy to say to what class of cases the Legislature meant article 60 to apply. It may apply to the transactions between a banker and his customers known as "fixed deposits" or it may apply only to deposits of money made with a private person. It is, however, unnecessary to come to a

(1) (1847) 16 M. and W., 321.
(2) (1866) 36 L J Ch, 151.
(3) (1893) 3 Ch, 154
(4) (1857) 24 Beav, 302
(5) (1875) 24 W R, C. R., 42.
(6) (1880) 6 C L R., 470, 472.
(7) (1882) 12 C. L. R., 165, 168.
(8) (1888) I. L. R., 13 Bom. 338.
(9) Panj. Rec., 1885, No 95, pp 208, 210, 211, 213.
(10) F A No. 96, 1862, decided 4th April, 1865
(11) (1888) I. L. R., 16 Calc., 25.
(12) (1886) I. L. R., 18 Mad., 390.
(13) (1904) I. L R, 31 Calc, 519, 528
(14) (1894) I. L. R., 19 Bom., 352, 357.

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decision on the point, holding, as we do, that it is not intended to apply to a transaction which is regarded by the law as a loan. Now the authorities cited by the appellants clearly lay down that the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former. The case above referred to as having been decided by this Court was the decision of a Division Bench, and the facts were precisely as they are in this case. This being so, we have no alternative but to follow that ruling, unless we can distinguish it or differ from it so strongly as to think that the question should be considered by a Full Bench. This we are not prepared to do. It was decided by two eminent Judges of experience, one of whom was the Chief Justice. Of the rulings cited for the respondents only two are really in point, namely, the case in I. L. R. 16 Calc., and that in I. L. R., 18 Mad. The others may be differentiated. But, as we have said above, we are bound to follow the decision of this Court, more especially as it is supported by the numerous authorities cited by the appellant. We find, therefore, that article 59 of the second schedule of the Limitation Act applies to this case, and that the suit is barred by limitation, unless the respondents can satisfy us that the entries above referred to have the effect of extending the period of limitation.

We now proceed to consider the second point: and first as to the entries in the list prepared at the time when the defendants separated and made a division of their ancestral assets and liabilities. In the first place there is nothing to show that these lists were signed by any of the defendants, and in the next place they are not dated, and no oral evidence has been given as to when they were made. These are, we think, particularly the former, fatal objections to these entries being treated as acknowledgments within the meaning of section 19, and we, therefore, find that they cannot be so treated.

We now pass on to the next entry. Was the balance struck on the 11th of October 1902 such an acknowledgment? We think not, as it is open to the objection that it does not purport to be signed by any of the defendants, or their father Paras Das. This is sufficient in our opinion to render it useless as an acknowledgment. As to the contention that there was a payment of interest

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on the 11th of October 1902 and a part payment of the principal on the 24th of May 1902 within the meaning of section 20, it is based entirely on the entries in the defendants' own books.

According to the Full Bench ruling in the case in *Mukhi Haji Rahmutlulla* v. *Coverji Bhuja* (1), a part payment of the principal of a debt must appear in the handwriting of the person making the part payment and not in that of any other person, however authorized. There is nothing in the entry at page 33 R. of the payment of 80 rupees as house-rent, which is claimed as a part payment of the principal, to indicate that it was made by the person who made the payment. Following that ruling and the perfectly plain meaning of the proviso to the section, we hold that no part payment has been established.

Next as to the alleged payment of interest on the 11th of October 1902. It was held in *Ichha Dhanji* v. *Nutha* (2) and also by a Division Bench of this Court in the case in *Prag Das* v. *Baldeo Prasad* (3) that a mere credit of interest in the defendants' books could not be regarded as equivalent to a payment of interest.

We agree with the views expressed in those cases and hold that the entry above referred to has not the effect contended for and does not operate so as to extend the period of limitation. The appeal is accordingly allowed. We set aside the decree of the Court below and dismiss the plaintiff's suit, but under the circumstances of the case we allow no costs.

Appeal decreed.

(1) (1896) I. L. R., 23 Calc., 546. (2) (1888) I. L. R., 13 Bom., 343 at page 343.
(3) Weekly Notes, 1906, p. 212.